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THE FUTURE OF CIVIL MONETARY PENALTIES: TWO FEDERAL SAFETY STATUTES COMPARED

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INTRODUCTION

The enactment by Congress of the Federal Coal Mine Health and Safety Act of 1969 (Coal Mine Act)[1] began a new era of federal regulation which now extends not only to coal mines but also to the workplace and to the environment. In addition to providing extensive and detailed regulation of coal mines, Congress imposed the most comprehensive and, in the opinion of many in the mining industry, the most stringent system of enforcement ever enacted into law. What Congress did was to mandate that every violation of the Coal Mine Act or the regulations promulgated pursuant to it be assessed a civil penalty. These mandatory civil penalties are to be assessed regardless of the violation. Even the most trivial violation is assessed a penalty. To back up these mandatory civil penalties, Congress established additional specialized civil penalties and criminal penalties.

The major legal challenges to this Act have not been the traditional ones directed toward the basic authority of the Interior Department to promulgate regulations and to administer a far-flung program. The challenge now is to the method of enforcing the governmental policy. One author has pointed out:

> Government by agency regulation is here to stay. Only the methods, including the sanctions used, are subject to change.[2]

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[1] 30 U.S.C. § 801 *et seq.* (1970).

[2] McKay, Robert B., *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441 (1964) [hereinafter referred to as *Sanctions in Motion*].

This article will focus on these monetary civil penalties and on the legal challenges to them as an enforcement tool.

The importance of characterizing a penalty as civil or criminal will be analyzed in detail. The legal rationale for each type of penalty will be discussed with special emphasis placed on the standards applied by the courts in determining whether a penalty is civil or criminal in nature. Since challenges to the criminal aspects of the penalty are often asserted by those opposing such fines, the views of the Supreme Court are especially important. The problems of dual monetary penalties will then be analyzed. Two recent cases challenging this system of dual penalties will be discussed.[3] Each of these cases represents a strong challenge to the concept of dual penalties and monetary penalties in general.

Once the legal framework surrounding the civil penalty system is established, an evaluation of the effectiveness of the civil monetary penalty system itself will be made. Two similar health and safety statutes will be considered. First, the Federal Metal and Nonmetallic Mine Safety Act (Metal Mine Act) will be discussed. Next, the Federal Coal Mine Health and Safety Act of 1969 (Coal Mine Act) will be covered.[4] The relationship between these Acts provides an ideal context for comparing the effectiveness of two conceptually different monetary penalties in administering congressional programs. Each Act is enforced by the same agency, the Mining Enforcement and Safety Administration,[5] and each utilizes a similar administrative enforcement organization. A crucial difference is the lack of any meaningful monetary penalties in the Metal Mine Act and the *mandatory* civil penalties in the Coal Mine Act. The Coal Mine Act's penalties are extremely stringent, and if this Act proves to be successful, it should establish the mandatory civil penalty as an important enforcement tool.

This comparison of the Acts will demonstrate the central thesis of this article—that mandatory monetary penalties, for all their legal and administrative problems, are the most effective means

[3] United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558 (E.D. La. 1974), *rev'd* 537 F.2d 149 (5th Cir. 1976).

Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission, 519 F.2d 1200 (3d Cir. 1974), *aff'd on rehearing*, 519 F.2d 1215 (1975), *cert. granted*, 424 U.S. 964 (1976) (No. 75-746, 1976 Term).

[4] 30 U.S.C. §§ 801 *et seq.* (1970).

[5] The Mining Enforcement and Safety Administration has been abbreviated to MESA.

for securing a vigorously and effectively enforced congressional program.

I. NATURE OF SANCTIONS

A monetary penalty is a fine imposed in dollar amount for the commission of an act not in conformity with regulatory or statutory standards.[6] Monetary penalties fall into two broad categories—criminal penalties and civil penalties.[7] The nature of the penalty determines the rights of the penalized party and the duties of the government.[8] The penalized party generally desires that the penalty be treated as criminal in nature so that the maximum number of defenses may be asserted. The government generally desires to have the monetary penalty treated as civil in nature so as to short-circuit the burdensome criminal law requirements.[9] The amount of the penalty need not vary when the penalty is denominated civil or criminal. Often, the amount of the penalty is the same regardless of label and the money is paid to the general treasury.

Criminal penalties are often distinguished from civil penalties by "whether the legislative aim in providing the sanction was to punish the individual . . . or to regulate the activity in question . . . ."[10] The deterrent nature of a criminal penalty arises from the stigma attached to a criminal charge. This stigma provides powerful incentive to a violator to perform the required acts.[11]

The only consequence of a civil penalty is a monetary judgment in favor of the government.[12] The civil penalty seeks to deter statutory violations, although some statutes also attempt to use the collected money as compensation.[13] The main advantage of the

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[6] *See* 30 U.S.C. § 819 (1970).

[7] This dichotomy is refined into many subcategories. In some cases the distinction between civil and criminal penalties, as will be shown, becomes blurred.

[8] Charney, Jonathan I., *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974) [hereinafter referred to as *Constitutional Protections in Civil Penalty Cases*].

[9] This generalization is not always true. A defendant may prefer civil penalties so as to avoid the stigma of a criminal action. The government, of course, may demand a criminal conviction.

[10] United States v. Futura, Inc., 339 F. Supp. 162, 165 (N.D. Fla. 1972).

[11] United States v. Skil Corporation, 351 F. Supp. 295, 298 (N.D. Ill. 1972).

[12] United States v. J. B. Williams Co., 498 F.2d 414, 421 (2d Cir. 1974).

[13] Frank Irey, Jr., Inc. v. OSHA, 519 F.2d 1200 (3d Cir. 1974), *aff'd on rehearing*, 519 F.2d 1215 (1975), *cert. granted*, 424 U.S. 964 (1976) (No. 75-746, 1976 Term).

civil penalty is that it is flexible and does not burden the government with a criminal action. Flexibility is crucial to the effective administration of governmental programs. A commentator has stated:

> Civil money penalties provide an ideally flexible sanctioning tool. In their absence, agency administrators often voice frustration at having to render harsh "all or nothing decisions" (e.g., in license revocation proceedings) when enforcement needs would best be served by a more precise measurement of culpability and a more flexible response.[14]

Historically, the monetary penalty has been used by governments as a device to punish wrongdoing. This penalty technique is achieving new prominence today. The monetary penalty has been refined as a sanction to enforce regulatory programs. Its growth has been phenominal. The index to the United States Code Service published by the Lawyers Cooperative Publishing Company lists fifteen pages of references to Fines, Penalties and Forfeitures. More surprising is the 1975 pocket supplement which lists in fine print two more pages of recent fines. Apparently the congressional rule is to enforce new statutes with penalties; however, the use of the monetary penalty is growing with little systematic congressional inquiry into the effectiveness of the penalty sanction.[15]

In addition to the creation of new programs with civil monetary sanctions, Congress has relabelled some existing criminal monetary penalties as civil. Apparently, Congress believes that civil monetary penalties are more effective than criminal penalties. Possibly this trend is based upon the doctrinal perception that violations of environmental or health regulations are *mala prohibita* since no crime would exist except for the specific statute. Even though the regulatory offense may be very offensive to society it is not *mala in se* since the act is not considered inherently wicked. This view of regulatory violators clearly would justify the use of civil remedies to deter violations. In the future, however,

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[14] Goldschmid, Harvey J., *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 898 (1972) [hereinafter referred to as *Goldschmid Report*].

[15] *Id.* at 896.

pollution, health and safety violations may be viewed as inherently wicked.[16]

Another reason for the trend toward civil penalties is not based on the nature of the offense, but based instead on a desire to avoid the problems inherent in criminal law. The rationale here is that the polluter's offense is not to be treated as a traditional crime but as a civil infraction of the law. This is done even though strong arguments can be made that the act is criminal.[17] The increased demands of procedural due process, the high standard of proof, the right to counsel and the myraid other protections afforded to accused criminals stand in the way of effective enforcement of criminal penalties.[18]

Criminal prosecutions present many obstacles to the administrator. The rights granted a criminal defendant far exceed those granted a defendant in civil litigation. In a criminal penalty case, the defendant has full procedural due process, the right to a speedy trial and the benefit of a higher standard of proof to be met by the prosecution. The protections of the fourth and fifth amendments do not apply as fully to a civil action as they do to a criminal action. As will be shown later, the application of these criminal rights to civil penalty actions would greatly limit the effectiveness of the civil monetary penalty as a sanction.

A final reason for the trend toward civil monetary penalties is inherent in the nature of the administrative process. There is grave doubt that an administrative agency has the authority to determine the criminal guilt or innocence of an individual. The present procedure requires criminal monetary penalty cases to be processed through the Department of Justice. This arrangement is unsatisfactory from the agency point of view because, historically, the Department of Justice has not prosecuted adminstrative cases with zeal.[19] All of the above factors have resulted in a trend toward civil monetary penalties as the major sanction in achieving compliance with congressional policy.

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[16] Schwenk, Edmund H., *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 MICH. L. REV. 51, 52 (1943). *See also, Goldschmid Report* at 914.

[17] Often business personnel are fined during proceedings which afford the violator of the regulation significantly fewer rights than those given a person accused of a traditional criminal offense.

[18] *See Goldschmid Report* at 916.

[19] *Id.* at 923.

While this article will emphasize monetary penalties, it is important to note at the outset the diverse sanctions available to Congress in devising enforcement provisions for regulatory programs. Most statutes include at least one or more of these devices.

The first enforcement tool in the government arsenal is social approbation—the simple fact that law breakers are subject to censure from their fellow citizens. While this is not always the case, as some experiences in the coal mining regions show,[20] the violation of law is generally discouraged by fellow citizens. Agencies can use this approbation as an effective tool to achieve enforcement by publicizing an individual's wrongdoing. This places social pressure on the offender to conform to congressional dictates.[21]

The next device frequently used is the injunction with its companion contempt citation. The injunction compels, by way of court order, compliance with the statute or regulations. The injunctive action grants the administrator flexibility of action.

> The injunction directly focuses on the prevention of future pollution, avoiding the inflexibility of some other sanctions that look to punishment of past acts. In dealing with future acts, a court may develop the best course of action by balancing the various equities in light of the public policy issues involved. Injunctive relief may thus be tailored to bring a polluter into compliance with environmental laws over a period of time when the situation so warrants.[22]

There are, of course, drawbacks to the injunctive remedy. One drawback is delay. Often injunctions require an inordinate amount of time before a hearing is set. Also, layers of bureaucratic delay are inherent in the process of agency referral to the Department of Justice and the referral to the United States Attorney's Office. An agency as a rule cannot act on its own.[23] However, immediate and

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[20] In some areas of Pennsylvania and Kentucky, groups of small coal mine operators have refused to cooperate in the enforcement of the Federal Coal Mine Health and Safety Act of 1969. Some mine operators have received publicity for their defiance of the law.

[21] The vast majority of mine operators have complied with the law and have made efforts to comply with the health and safety regulations.

[22] Marshall, David W., *Environmental Protection and the Role of the Civil Money Penalty: Some Practical and Legal Considerations*, 4 ENV. AFF. No. 2, 323 (1975) [hereinafter referred to as *Environmental Affairs*].

[23] Injunction actions under the Federal Coal Mine Health and Safety Act of 1969 must be processed through the Department of Justice and then referred to the

irreparable damage to the environment can be restrained by use of a temporary restraining order. The temporary restraining order is often provided by statute along with the injunctive remedy.[24] Another weakness is the fact that injunctions only enjoin future violations. Past violations go without punishment.[25] Finally, as the *Reserve Mining Co. v. United States* case[26] shows, courts are extremely reluctant to shut down an offending polluter or violator.

Another remedy available is license or permit revocation. This remedy is used extensively by the Army Corps of Engineers in enforcing certain sanctions of the Federal Water Pollution Control Act.[27] License or permit revocation normally occurs when a holder of a license or permit granted by an agency refuses to comply with an agency rule or regulation. The agency, in order to compel compliance, issues what has been called an "economic death sentence."[28] Although effective, license revocation is limited.

> Those concerned about agency sanctions, like military planners, have sometimes only belatedly realized that the capacity for "massive retaliation" (e.g., the capacity to render an economic death sentence by license revocation, or by denials of contracts or grants) should be complemented by the ability to render a more precise (in terms of measuring culpability) and flexible response. Agency administrators indicate that there is often demonstrable need for a wider range of sanctioning power.[29]

A final enforcement sanction provided by Congress is the *Qui Tam*[30] action or the right of a private party to maintain an action to enforce a statute. *Qui Tam* actions have been used to goad

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appropriate United States Attorney's Office. The average delay from date of the violation to date of hearing is six months.

[24] 30 U.S.C. § 818 (1970) provides both temporary restraining orders and preliminary injunctions for violations of the Federal Coal Mine Health and Safety Act of 1969. A similar provision for the Federal Metal and Nonmetallic Mine Safety Act is found at 30 U.S.C. §§ 721 *et seq.* (1966).

[25] No penalties have ever been collected under the Federal Metal and Nonmetallic Mine Safety Act although some injunctions have been issued.

[26] 498 F.2d 1073 (8th Cir. 1974). *See also* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

[27] 33 U.S.C. § 412.

[28] *Goldschmid Report* at 908.

[29] *Id.*

[30] "*Qui Tam*" is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parts sequitur*, which means "who sues on behalf of the King as well as for himself."

agencies into action. Although *Qui Tam* actions have been brought by citizens, courts have refused to allow citizen enforcement of the Rivers and Harbors Act of 1899.[31] Section 411 of the Rivers and Harbors Act provides that one half of fines assessed against violators of Section 407 shall, at the discretion of the Court, be paid to the person or persons giving information which leads to the conviction. The Supreme Court in *United States ex rel. Marcus v. Hess*,[32] stated by way of dicta that informers' actions were a well-established part of the American legal system. Still, the effectiveness of *Qui Tam* actions has been largely undermined by courts which construe Section 413 of the 1899 Act as giving the Justice Department exclusive authority to enforce this Act.[33] The final result has been that *Qui Tam* actions are largely ineffectual.

The enforcement tools discussed above are largely being supplanted by civil and criminal monetary penalties. These sanctions provide the needed flexibility that the others lack. The monetary penalty offers an administrator all the flexibility needed to enforce complicated and far-flung legislative programs. It is the effectiveness of these penalties that will be focused upon in the remainder of this article.

II. Analysis of Monetary Penalties

A. Types of Monetary Penalties

There are two types of monetary penalties—the civil penalty and the criminal penalty. Each type may be broken down into an individual penalty and a corporate penalty.

A civil penalty is normally defined as a penalty which is characterized by Congress as civil and which imposes a fine only to enforce a remedial statute.[34] Unless specifically stated in the statute, a civil penalty applies to the entity violating the statutory requirements. Therefore, the penalty can be imposed on the partnership or corporation as an entity without special proof of business status.[35] Individual civil penalties normally apply when special acts are committed by an individual. The penalty, therefore,

[31] 33 U.S.C. §§ 407, 411 (1899).

[32] 317 U.S. 537 (1943), *reh. den.* 318 U.S. 799 (1943).

[33] 33 U.S.C. § 413 provides that the Department of Justice shall "conduct the legal proceedings necessary to enforce the foregoing provisions" of the Act.

[34] Civil penalties are also known as civil forfeitures or civil money penalties.

[35] 30 U.S.C. § 819(a)(1) (1970) provides for the imposition of a civil penalty on the operator of a coal mine who violates a mandatory health or safety standard.

is imposed on the person regardless of the business status of the employer.[36] Often individual penalties are assessed for willful conduct while civil penalties are imposed on the corporation for the conduct regardless of knowledge.[37]

Criminal penalties, of course, run the gamut from the fine imposed by a judge for the commission of a traditional crime to penalties imposed for the willful or gross disregard of a regulation imposed by statute. The distinctions between a civil and criminal penalty become vague when willful conduct is involved. However, the criminal penalty has been imposed on individual and corporate entity alike.[38]

In discussing the monetary penalty, this article focuses on enforcement of congressionally mandated policies and the monetary penalty as a tool for forcing compliance. A civil penalty has a "remedial" purpose and is used to encourage compliance, while a criminal penalty is "punitive" and is used to punish wrongdoing. This distinction has little effect on the person fined, since one hundred dollars paid to the treasury affects him identically, regardless of the punitive or remedial character of the fine. This distinction is crucial, however, in determining the legal rights of the defendant in challenging the penalty.[39]

While it is clear that Congress has the authority to promote the effective administration of its programs, great homage is paid to the legal fiction that a particular fine may be classified as either remedial, punitive, or a revenue-gathering device.[40] Courts have generally ignored the overlapping nature of the various types of penalties.[41] Regardless of labels, a penalty may be imposed for enforcement, remedial, and punitive purposes simultaneously.[42]

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[36] 30 U.S.C. § 819(a)(2) (1970) provides for a $250 civil penalty against any miner who willfully violates the mandatory safety standards related to smoking.

[37] 30 U.S.C. § 819(c) (1970) provides for civil penalties against a corporate officer who willfully refuses to comply with any order issued under the Coal Mine Act.

[38] The criminal penalty is increasingly being used as a backup to civil penalties. The criminal penalty must then be assessed against the same person as the civil penalty, leaving only the severity of conduct as the determining factor in the choice of the sanction.

[39] Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission, 519 F.2d 1200 (3d Cir. 1974), *aff'd on rehearing*, 519 F.2d 1215 (1975), *cert. granted*, 424 U.S. 964 (1976) (No. 75-748, 1976 Term).

[40] *See, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

[41] *Goldschmid Report* at 914 to 916.

[42] *Id.*

The basic rationale for all monetary penalties regardless of label is to eliminate the incentive to pollute, violate a health or safety standard, or violate some other congressionally established policy.

B. Administrative Imposition of Penalties

A further trend in the monetary penalty field is toward the administrative imposition of penalties. Under this system, penalties are imposed and collected by the agency itself with little court interference. *De novo* review of the agency's penalty by federal courts is sharply curtailed.[43] The rationale for this further step away from traditional jurisprudence lies in the nature of the civil penalty itself.

> This result (i.e., the imposition of money penalties for regulatory offenses without an alleged offender being afforded safeguards surrounding criminal prosecutions) may be justified on the following grounds:
>
> (i) only money is at stake;
>
> (ii) civil penalties for "*malum prohibitum*" offenses do not open an alleged offender to the disgrace and other disabilities associated with criminal conviction; and
>
> (iii) at times, the penalty may indeed roughly approximate a proportionate reimbursement for monies lost (or damages suffered) by the government and/or for the cost of the enforcement system.[44]

The trend toward administrative imposition of civil monetary penalties is clearly a creature of necessity. Without some attenuation of the bundle of legal rights available to the defendant, the growth of the civil penalty as a tool of enforcement would cease. Given the practical necessity for the civil penalty, a strong basis exists for justifying administrative imposition without a full scale judicial hearing.

One commentator has suggested that administrative imposition of monetary penalties would provide the following advantages over the present system with de novo review by federal courts:

> 1. Cases which now languish on judicial dockets could be adjudicated quickly, efficiently and at relatively low cost.

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[43] *Id.* at 936-47. This method is advocated by Professor Goldschmid as a means of avoiding the negative effects of the *de novo* review approach to civil penalty assessments.

[44] *Id.* at 915.

> 2. Unwise settlement (from the standpoint of the public's interest in deterring or remedying violations of regulatory laws) would be avoided by eliminating the inhibitions on agencies created by the unavailability of (or inappropriateness of taking a case to) overburdened courts. Concomitantly, the availability of a forum should temper administrative inclinations towards arbitrariness.
> 3. Dual and overlapping efforts by an agency and the Department of Justice would be eliminated.
> 4. There would no longer be an opportunity for recalcitrant defendants (who now will not settle and cannot easily be brought to trial) to escape the consequences of their improper acts.
> 5. An alleged offender would, at his or her option, be provided with procedural protections and an impartial forum in which to present a defense. No such forum or protection is available as a practical (as opposed to theoretical) matter now.
> 6. Fair settlements should be facilitated since neither the agency nor the alleged offender would be able to premise obstinacy on the inability or unwillingness of the other to go to court.
> 7. Cases which are simply inappropriate (e.g., because of their dollar magnitude and the expertise involved) would be removed from federal district courts at a time when there is general agreement that we "have poured more into the courts than they can digest." As Judge Hufstedler recently said, "We have tended to treat every case, whatever its genesis and whatever its dimension, as if it warranted meticulous discovery, several bouts of pleading, a pretrial conference, a 12-man jury, full throttle adversary proceedings, and a few reruns . . . . We can no longer indulge ourselves in those luxurious assumptions.
> 8. Substantial evidence review would be available in the courts of appeals as an ultimate (though presumably seldom used) protection against abuse.[45]

The Supreme Court has provided a rationale in support of this position. In *Lloyd Sabaudo Societa v. Elting*,[46] the Court held that the administrative imposition of a monetary penalty was valid although no *de novo* review in federal court was provided by the Immigration Act of 1924. The Court, in allowing the administrative imposition of penalties, noted congressional limitations:

> . . . the statute imposing the fines must be regarded as an incident to the exercise by Congress of its plenary power to

[45] *Id.* at 928-29.
[46] 287 U.S. 329 (1932).

> control the admission of aliens, and due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends. It follows that as the fines are not invalid, however imposed, because unreasonable or confiscatory in amount, which is conceded, Congress may choose the administrative rather than the judicial method of imposing them.[47]

This concept of administrative imposition of civil penalties may seem afoul of the seventh amendment right to a jury trial. This issue is presently before the Supreme Court in *Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission.*[48] Given this growing trend toward monetary penalties, what then is the role of the criminal monetary penalty?

C. Criminal Monetary Penalties

At present, criminal penalties are increasingly being used as a back-up to civil penalties. The threat of criminal penalty is being reserved for recalcitrant violators of congressional programs. Once the deterrent effect of a civil penalty is exhausted, criminal procedures are then initiated by indictment.[49] As the use of the criminal penalty is reduced, many of its administrative and procedural faults pointed out in the Introduction are eliminated.

Since the criminal penalty is used sparingly, the Department of Justice is not deluged with unimportant cases. The cases referred to it are serious and appropriate for criminal action.[50]

Most importantly, the offense now committed by the defendant is no longer *malum prohibitum* but takes on the nature of a traditional *malum in se* crime. This provides both the Justice Department and the courts with incentive to prosecute. The offense becomes major and serious and not merely one of many thousand similar "technical" violations of the law.[51]

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[47] *Id.* at 335.

[48] Note 39 *supra*. Oral argument was held on November 24, 1976.

[49] In practice, the criminal indictments under the Federal Coal Mine Health and Safety Act of 1969 have been reserved only for the most flagrant violators. As will be discussed later, all criminal indictments have been tied up in litigation. There has only been limited success in the use of this remedy.

[50] *Environmental Affairs* at 329.

[51] *Id.* at note 41.

One commentator, pointing out the ineffectiveness of widespread use of criminal sanctions, stated:

> The major defect in a system of criminal sanctions used to enforce environmental laws is conceptual. The subject matter of these and other health and safety laws is considered to be *malum prohibitum*. The prohibited act is a crime not because it is considered morally wrong, but merely because it has been declared unlawful. Therefore, the real deterrent value of the criminal sanction, the stigma of moral blame, is greatly reduced. The second difficulty is more practical. A great amount of unlawful pollution is caused by corporations which, of course, cannot be imprisoned. A monetary fine can only be effective where it is greater than the cost of compliance. When imposed, however, criminal fines have been very small, and have effected no real deterrence.[52]

After noting the lack of moral culpability attached to the unlawful act, this commentator stresses that administrators and prosecutors are reluctant to invoke criminal sanctions, that jurors are reluctant to find guilt, and that judges are reluctant to impose strong penalties.[53]

These problems are eliminated when the use of the criminal penalty is reserved for more serious violations. The effectiveness of the criminal penalty is enhanced by its use in conjunction with the civil penalty.

> Thus where no criminal intent is required, jury nullification and related problems cripple the efficacy of the criminal sanction. The sanction is appropriate, however, in cases involving demonstrably intentional, wanton, or reckless violations. Here, some measure of moral culpability is involved and the sanction may act as an effective deterrent.[54]

III. Analysis of the Civil Versus Criminal Penalty Distinction

A. Overlapping Penalties

There is often a fine line between civil and criminal penalties. Special types of civil penalties intended for the more serious offender are indistinguishable from criminal penalties. These impose increasingly higher fines for aggravated conduct. Problems have

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[52] *Id.* at 330.
[53] *Id.* at 329.
[54] *Id.* at 330.

arisen as to the nature of this type of penalty. The individual civil penalty is an example. Individual penalties are assessed against the person or entity actually committing the offense, and are clearly intended to punish a wrongdoer. Stiffer fines are imposed for aggravated or willful misconduct.[55] Some statutes provide for cumulative penalties with the amount of the fine increasing with each occurrence of the forbidden conduct.[56] These individual penalties clearly approach criminal sanctions, and it is in this area that courts look closely to see whether the procedural and due process requirements of the Constitution are met. This area is the battleground for challenges to civil monetary penalties.[57]

B. Civil Versus Criminal Penalty

Clearly, as monetary penalties become more prevalent and substantial, the traditional distinctions between civil and criminal fines will be opened to searching challenge. Historically both civil and criminal penalties have been used as a sanction in American law. Court decisions in the early 1900's approved the civil sanction device. As government regulation began to grow, courts began modifying the rules concerning civil sanctions and eventually reached the present state of law, whereby a court in determining the nature of a monetary penalty will analyze the congressional motive. The extent of this trend will determine the effectiveness of civil penalties as a sanction. The more rights granted a defendant in a civil penalty action, the less effective that sanction will be.

The distinction as to whether or not a monetary fine is imposed as a civil or criminal penalty often involves a question of the intent of the agency imposing the penalty. One author noted:

> The problem of distinction between criminal and civil sanctions is further heightened by the difficulty in determining whether monetary fines are imposed as criminal or civil sanctions. Presumably, an administrative agency can assess and collect a fine so long as it is not an exercise of criminal jurisdiction. On the other hand, "civil procedure is incompatible with the accepted

[55] *See* 30 U.S.C. § 819(b) and (c) (1970).

[56] 30 U.S.C. § 819(a)(1) (1970).

[57] In recent individual civil penalty actions against Finley Coal Company, the mine operator has challenged the civil nature of penalties under 30 U.S.C. § 819(c). Criminal actions were brought against Finley Coal Company in United States v. Finley Coal Company, 493 F.2d 285 (6th Cir. 1974).

> rules and constitutional guarantees of power governing the trial of criminal prosecutions." But even that statement, incontestably sound as a generalization of constitutional principle, was no more than dictum in the case in which the recitation was made.[58]

In a statement invariably quoted by opponents of civil penalties, Mr. Justice Frankfurter expressed dismay at the "dialectical subtleties" of distinguishing between civil and criminal penalties.[59]

In 1908 the Supreme Court unequivocally held that the mere fact that a statute provides for a penalty does not make the statute a criminal provision.[60] The Court held that provisions of "An Act to Regulate the Immigration of Aliens into the United States," which imposed monetary penalties on a steamship company for importing aliens afflicted with a loathsome or dangerous contagious disease were constitutional. The steamship company asserted that this civil penalty was actually criminal in nature and did not differ substantially from the criminal fines and jail terms provided in other sections of the Act. The Court, in noting this objection, stated:

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.[61]

Since the authority of Congress to bring aliens into the United States "embraces every conceivable aspect of that subject"[62] it follows that the method devised by Congress to enforce that Act is constitutional.

Probably the most important aspect of this decision is the fact that it is limited to Congress' unquestioned control over the entry

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[58] McKay, Robert B., *Sanctions in Motion: The Administrative Process*, 49 IOWA L. REV. 441, 444 (1964) (footnotes omitted).

[59] United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 554 (1943) (concurring opinion).

[60] Oceanic Steam Navigation Company v. Stranahan, 214 U.S. 320 (1908).

[61] *Id.* at 339.

[62] *Id.* at 340.

of aliens.[63] Since most new civil penalty statutes are based on the authority of Congress over interstate commerce, the authority of Congress will change as Supreme Court interpretations of the commerce clause fluctuate.[64]

In *United States v. Regan*,[65] the Supreme Court held that defendant's violation of Section 4 of the Alien Immigration Act of 1907 need not be established beyond a reasonable doubt in an action of debt brought by the United States to recover the amount of the penalty assessed for the violation, since the action was civil in nature. In an apparent attempt to lay to rest challenges to the penalty provision of the Alien Immigration Act, the Court engaged in a detailed discussion of the history of monetary penalties.

The Court noted that its decision in *Stockwell v. United States*[66] established the right of the government to sue in a civil action as any other plaintiff. In *Stockwell* the Court stated:

> [B]ut it is insisted that when the government proceeds for a penalty based on an offense against law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained.[67]

In *United States v. Zucker*,[68] the Court held that the defendant had no rights under the sixth amendment of the Constitution in an action by the United States to recover a debt.

> The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for

[63] *Id.*

[64] A more narrow interpretation of the commerce powers of Congress will restrict federal jurisdiction over small polluters or violators of health and safety standards. *See* Morton v. Ralph Bloom, 373 F. Supp. 797 (W.D. Pa. 1973).

[65] 232 U.S. 37 (1914).

[66] 80 U.S. (13 Wall.) 531 (1871).

[67] *Id.* at 542.

[68] 161 U.S. 475 (1896).

> money that could be established without disclosing any facts tending to show the commission of crime.[69]

The view expressed by the Court in both *Stockwell*[70] and *Zucker*[71] is that the action brought by the government would be a civil action if brought by any other party. The rationale for this view is that a civil action is the same regardless of whether the United States government or a private party brings it. As long as the debt is a fixed sum, the Court will not look behind the debt; instead, the action in debt will be treated as a civil action, and the debtor will have no additional rights because the debt was incurred against the United States. The Court did point out, however, that Congress could grant the debtor increased rights if it so chose.

> It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal. Of course, if the statute by which the penalty was imposed contemplated recovery only by a criminal proceeding, a civil remedy could not be adopted.[72]

The court in *United States v. Regan*[73] then summarized its position, stating:

> It is a necessary conclusion from these cases (1) that, as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize, and in this instance has authorized, the enforcement of such penalty by either a criminal prosecution or a civil action; (2) that the present action is a civil one and appropriate under the statute; and (3) that, if not directed otherwise, such an action is to be conducted and determined according to the same rules and with the same incidents as are other civil actions.[74]

This decision represents the most extreme view of the Supreme Court. The more recent decisions have backed away from this position. In these later opinions the Supreme Court has begun to look behind the civil action to determine if in reality it is civil; however, civil penalty provisions have been upheld by the Su-

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[69] *Id.* at 481.
[70] 80 U.S. (13 Wall.) 531 (1871).
[71] 161 U.S. 475 (1896).
[72] 232 U.S. 37, 43 (1914).
[73] 232 U.S. 37 (1914).
[74] *Id.* 46-47.

preme Court. How far this trend will go is uncertain. Increasing governmental regulation may tempt the Court to look more closely at these "civil" actions in an effort to restrain governmental regulation.

In *Trop v. Dulles*,[75] the government urged that the provision of the Nationality Act of 1940 which provided for the loss of nationality, citizenship, or loss of political rights by reason of desertion committed in time of war was a civil sanction and therefore the full constitutional guarantees applicable to criminal defendants were not needed in order to deprive a deserter of citizenship. In rejecting the government's contention, the Court stated:

> How simple would be the tasks of constitutional adjudiction and of law generally if specific problems could be solved by inspection of the labels pasted on them! . . . Doubtless even a clear legislative classification of a statute as "non-penal" would not alter the fundamental nature of a plainly penal statute.[76]

The Court noted that even the views of the Cabinet Committee and of the Congress itself as to the nature of the statute were equivocal and could not possibly provide the answer. The standard to be applied by the Court was that of "careful consideration."[77]

In carefully considering the nature of the penalty, the Court looked to the purpose of the statute and not merely to congressional intent alone.

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature.[78]

The existence of a regulatory purpose in conjunction with the

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[75] 356 U.S. 86 (1958).

[76] 356 U.S. 86, 94-95 (1958).

[77] *Id.* at 95.

[78] *Id.* at 96.

punitive purpose will not save the civil nature of the remedy.[79] Therefore, the mere recitation that a penalty is imposed for remedial purposes will not save it as a civil remedy if the Court in examining the purposes of the legislation determines that there are also punitive goals. This distinction is often a narrow one in the case of monetary fines.

In another case, the New Jersey District Court looked to the wording of the statute to determine the nature of the penalty. Here, the defendant refused to be fingerprinted upon pleading guilty to seven charges of the Motor Carriers Chapter of the Interstate Commerce Act and urged that the fines imposed were not criminal in nature, and therefore the United States Marshal was without authority to fingerprint him.[80] The New Jersey District Court, in rejecting this argument, noted that while the statute itself was silent as to the nature of the penalty, the language of the statute, which referred to "offenses" and "conviction", indicated the intent of Congress to impose criminal monetary penalties.[81]

In the landmark decision of *Kennedy v. Mendoza-Martinez*,[82] the Supreme Court attempted to summarize the growing body of law surrounding the civil versus criminal penalty controversy. Here the Court held unconstitutional the sections of the Nationality Act of 1940 and the Immigration and Nationality Act which deprived wartime deserters of their citizenship for leaving or remaining outside the United States at time of war or national emergency for the purpose of evading the military service. The defendant urged that the statute was defective because the full procedural safeguards guaranteed to criminal defendants by the fifth and sixth amendments of the Constitution were not granted to him since the sanction was styled as a civil action. The Court rejected the contentions of the government that the punishment was civil in nature and focused on the difficulties in determining the nature of the penalty.

> The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of

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[79] *Id.* at 98-99.

[80] United States v. Krapf, 180 F. Supp. 886 (D.N.J. 1960).

[81] *Id.* at 889.

[82] 372 U.S. 144 (1963).

> solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.[83]

These seven factors are only to be considered absent conclusive evidence of congressional intent as to the penal nature of a statute. These factors are to be considered in relation to the statute on its face. Since the facts at hand clearly manifested congressional intent to punish, the provisions of the statutes involved were held to be criminal in nature and violative of the Constitution.

This decision thus establishes a two-part test. First, it must be determined if there is conclusive evidence of congressional intent to establish punitive sanctions. If so, then the court need go no further. If the answer is negative, the seven-part test is applied.

The next question must be, what is conclusive evidence of congressional intent? Justice Stewart in his dissent was not convinced of the punitive intent of Congress:

> It seems clear to me that these putative indicia of punitive intent are far overbalanced by the fact that this legislation dealt with a basic problem of wartime morale reaching far beyond concern for any individual affected.[84]

The overlapping nature of the two-part test has allowed lower courts to look behind the congressional statement of purpose and apply the seven-part test to determine whether the courts should allow full criminal rights in each instance. The Court in *Kennedy v. Mendoza-Martinez*[85] has opened the door to scrutiny of the underlying purposes of congressional actions. Moreover, it is conceivable that a court will declare a civil remedy illegal in order to stem the growth of government regulation.

A close look at how the courts have interpreted this decision is appropriate. In *Telephone News System, Inc. v. Illinois Bell*

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[83] 372 U.S. 144, 168-69 (1963).

[84] *Id.* at 209.

[85] *Id.*

Telephone Company,[86] plaintiff sought to enjoin the Illinois Bell Telephone Company from discontinuing service under statutes forbidding the use of telephone service for the purpose of transmitting or receiving illegal gambling information. Illinois Bell Telephone Company had notified plaintiff of its intent to discontinue telephone service at the request of the Justice Department. The trial court granted a temporary injunction and, during the hearing on the merits, plaintiff asserted that the statute providing for disconnection of telephone service authorized the prosecution of a crime under the guise of a civil remedy. In rejecting this position, the appellate court stressed that the mere fact that a sanction is conditioned upon criminal behavior does not conclusively determine the question of whether a provision is penal or not. Furthermore, the deprivation of property is insufficient to establish the nature of the sanction involved. The Court looked exclusively to the legislative history:

> The governing inquiry on the issue of the civil or penal character of a provision is whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question.[87]

The Court found here that the legislative history in no way suggested that Congress intended that the discontinuation of telephone service be a penalty for the violation of a criminal statute. The aim of the statute was merely "to curtail professional gambling activities"[88] by depriving those engaged in such activities of rapid communications facilities.

Even though the legislative history was clear, the Court apparently felt compelled to apply the Supreme Court test for cases when the legislative history is not clear:

> [I]t is appropriate to note summarily, however, that the discontinuation of telephone service is not an "affirmative disability or restraint"; it is not historically regarded as punishment; it is not meant to promote retribution and deterrent, [sic] but to prevent the continued use of communications to facilitate professional gambling activities; it has an "alternative purpose" and does not appear to be excessive in relation to that purpose.[89]

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[86] 220 F. Supp. 621 (N.D. Ill. 1963).

[87] *Id.* at 630.

[88] *Id.*

[89] *Id.* at 631.

Once the legislative history has been found to indicate that Congress intended a criminal sanction, the Court's inquiry is ended even though the terms of the statute are silent.[90] Once there is unmistakable evidence of punitive intent, the sanction is criminal.

Each sanction must be judged on a case-by-case basis with the final determination turning on the particular context involved. The rationale established in *Kennedy v. Mendoza-Martinez*[91] is not all-inclusive. Flexibility is needed because of the large number of monetary and nonmonetary penalties that are imposed. The unique circumstances of each penalty must be considered by a court. For example, the Fifth Circuit Court of Appeals in *Atlas Roofing Company v. Occupationa S. & H. Rev. Com'n.*,[92] applied in detail the seven-part test of the Supreme Court and held that a civil penalty assessed under the Occupational Health and Safety Act was civil in nature since, taken as a whole, the seven-part test of the Supreme Court as applied to the facts demonstrated that Congress meant to regulate and not reprimand. The trend of courts in analyzing civil penalties is definitely toward the type of detailed analysis applied in this case.

In summary, a court when faced with the determination of whether a monetary penalty is civil or criminal in nature, must make a threshold inquiry as to the congressional intent. If strong congressional intent to impose a civil remedy is apparent, the district courts are bound to treat the penalty as civil. While Congress cannot, of course, subvert the criminal justice system, Congress can attempt to use civil remedies and thereby avoid many of the burdensome requirements of the criminal law. If the court determines that the legislative history is unclear, then the seven criteria outlined by the Supreme Court must be considered. Trial courts have determined that this procedure be applied on a case-by-case basis. There is a great opportunity here for the striking down of civil penalties.

Courts in looking at a civil penalty assessment are required to substantially limit the procedural and substantive rights of a defendant once it is determined that the penalty is civil in nature. A

[90] United States v. Futura, 339 F. Supp. 162, 165 (N.D. Fla. 1972).

[91] *See* note 82.

[92] Atlas Roofing Company, Inc. v. Occupational S. & H. Rev. Com'n, 518 F.2d 990 (5th Cir. 1975), *cert. granted* 424 U.S. 964 (1976) (No. 75-748, 1976 Term).

trial judge may view this loss of rights as harsh. A close look at the rights a defendant loses once the penalty is declared "civil" is important. The loss of procedural rights is significant.

D. Summary of Affected Procedural Rights

One author establishes eight categories of rights which are denied to a defendant once a finding is made by a court that the penalties imposed are civil. This loss of procedural rights is especially important when considered in the light of what often amounts to a fictional difference between civil and criminal penalties.

> Civil penalties have been enacted to deny defendants the protections normally afforded in criminal prosecutions. However, the courts still have not determined which rights enjoyed by criminal defendants may be dispensed with in civil prosecutions. Indeed, there is authority to support both the grant and denial of a number of important rights to civil defendants. Prosecutors often are unsure of the stance they are to take in civil penalty cases, and the alert defendant should assert each right separately in order to assure himself the maximum in protections and the greatest delay.[93]

The determination that a penalty is civil limits the jury rights available to a defendant. A defendant in a criminal action absent a knowing waiver, clearly has a right to a jury trial. This is not the case in an action involving a civil penalty. The seventh amendment[94] does provide a right to a jury trial in civil cases where the right existed at common law and where the amount in controversy exceeds twenty dollars. This procedure has been effectively circumvented. Courts have held that administrative findings can be the basis for the assessment of civil penalties.[95] The penalties administratively determined are then enforceable in federal district court in a civil action. Often review in district court is limited to the substantial evidence test.[96]

Another limitation is the lack of the right to confront one's accusor. In civil penalty actions the defendant does not enjoy this right. Depositions of absent witnesses are sufficient as evidence,

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[93] *Constitutional Protections in Civil Penalty Cases* at 483.

[94] U.S. Const. Amend. VII.

[95] Helvering v. Mitchell, 303 U.S. 391, 402 (1938). This issue is now before the Supreme Court in Frank Irey Inc. v. Usery, see, note 39.

[96] *Constitutional Protections in Civil Penalty Cases* at 483-84.

and the penalty can be assessed without the presence of the defendant.[97]

The fifth amendment provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."[98] This prohibition against double jeopardy does not apply when one penalty is styled criminal and the other styled civil even though both arise out of the same transaction or occurrence. As a general rule, a person acquitted or convicted of a criminal charge can be subjected to a civil penalty for the same acts involved in the criminal action.[99] This aspect of civil penalties is currently under strong challenge in *United States v. LeBeouf Bros. Towing Co.*[100] The *LeBeouf* decision and briefs will be discussed in a later section. This loss of double jeopardy protection appears harsh, though technically justifiable.[101]

The standard of proof required to assess a civil penalty against a defendant is much lower than that required in a criminal case.

> The due process clause requires that the prosecution in a criminal proceeding prove guilt beyond a reasonable doubt. In suits to enforce civil penalties, however, the prosecution need prove a violation of the statute only by a preponderance of the evidence.[102]

Administrative cases have even required defendants to sustain the burden of proof even though the penalty was assessed by the government. This is full circle from traditional cases.[103]

The exclusionary rule which prohibits the use of illegally obtained evidence in the furtherance of a criminal prosecution may

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[97] *Id.* at 485. Civil penalties are often assessed under the Federal Coal Mine Health and Safety Act of 1969 through default proceedings in which no testimony from any party is taken. The order of assessment is based solely on the record.

[98] U.S. CONST. amend. V.

[99] *Constitutional Protections in Civil Penalty Cases*, at 485. *See also* One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972); Coffey v. United States, 116 U.S. 436 (1886).

[100] 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976).

[101] *Id.* The *LeBeouf* decision presents an ideal format for the Supreme Court to restrict the use of dual penalties.

[102] *Constitutional Protections in Civil Penalty Cases* at 487.

[103] *Id.* at 487-88. *See also* Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975). Here the Court of Appeals held that in a proceeding to review an order of a federal mine inspector closing a mine, the mine operator carried the ultimate burden of proof to show that the closure order was improperly issued. The government only had to make a *prima facie* case.

be applicable to both civil and criminal proceedings alike. While the issue has not been met squarely, the Supreme Court, in *One 1958 Plymouth Sedan v. Pennsylvania*,[104] applied the exclusionary rule in a forfeiture proceeding involving a motor vehicle.

The privilege against self-incrimination has been held applicable to civil penalty proceedings when the "civil" penalty is in reality quasi-criminal. In the landmark decision of *Boyd v. United States*,[105] the Supreme Court found that the privilege was applicable because of the quasi-criminal nature of the penalties sought to be imposed and the fact that discovery of the requested information could lead to a criminal prosecution thereby triggering the fifth amendment privilege. However, no Supreme Court cases have dealt with penalties which are clearly civil and without underlying criminal sanctions. In one recent case, a district court held the privilege against self-incrimination to be inapplicable in a civil action because "[t]he possible incriminating effect is only with respect to speculative, future acts of defendant."[106]

The rule requiring narrow construction of criminal statutes does not apply in civil penalty proceedings. This is of necessity, since many broad regulatory statutes require flexible standards which can be applied to individual entities. By necessity many of these regulations are broad and occasionally vague. Words such as "safe" and "adequate" are often applied.[107] Vague or overly broad prohibitions, of course, deny a defendant adequate notice of the potential offense. The Supreme Court has held that the doctrine of narrow construction need not be applied in civil penalty cases brought by the government.[108] The Court left open, however, the question of quasi-criminal penalties. In one prior case, *Corporation of Haverford College v. Reeher*,[109] the Court narrowly construed a statute providing administrative denial of aid to a student who engaged in disruptive activities.

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[104] 380 U.S. 693 (1965).

[105] 116 U.S. 616 (1886).

[106] Morton v. V. R. Hylton, Civil Action No. 75-4-414, (S.D. Tex. October 31, 1975).

[107] Regulations promulgated under the Federal Coal Mine Health and Safety Act of 1969 by necessity rely on such general terms in order to allow maximum flexibility for the federal mine inspector.

[108] Mouring v. Family Publications Service, Inc., 411 U.S. 356 (1973).

[109] 329 F. Supp. 1196 (E.D. Pa. 1971).

E. Inconsistent Application of Rights in Civil Penalty Cases

At the present time, each individual fact situation determines whether the procedural rights applicable to criminal actions are applicable to civil penalty actions. There is no clear-cut dividing of rights.

> Even on the availability of individual procedural safeguards there is split of authority. This confusion is a product of many divergent theories which have been used to classify a proceeding as criminal or civil. There is no unifying thread running through either the theories or the cases in which they have been applied. Consequently, it is virtually impossible to find any order in the disparate treatment of defendants' rights. . . .[110]

This lack of consistency on the part of courts regarding the applicability of criminal procedure to civil penalty proceedings is detrimental to the future effectiveness of civil penalty proceedings.[111] This is so because the primary purpose of civil penalties is to increase the effectiveness of enforcement tools by avoiding the delays and complications inherent in criminal proceedings. Each additional right afforded a defendant detracts from the effectiveness of the civil penalty as an enforcement tool. Each additional procedural requirement acts as a roadblock to speedy enforcement. This passion for efficient enforcement, while the mark of a good administrator, may run afoul of the traditional relationship between the citizen and the government.

This same conflict is responsible for the inconsistency in the decisions of courts. Courts are confronted by two basic forces when adjudicating civil penalty cases. On the one hand, there is great concern on the part of the bench with the overcriminalization of the law and this has resulted in a desire to encourage civil proceedings. This desire to encourage civil proceedings is on the other hand balanced by an apprehension on the part of judges that civil penalties are in reality criminal sanctions masquerading under the guise of the term "civil." This apprehension is coupled with the tradi-

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[110] *Constitutional Protections in Civil Penalty Cases* at 491.

[111] In *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973), the court upheld the right to inspect coal mines without a search warrant. A Texas court in *Brennan v. Gibson's Products, Inc.*, Civil Action No. 5-75-5-CA (E.D. Tex. 1976) construed the Occupational Health and Safety Act (OSHA) to require search warrants when objection is made to the OSHA inspections. The court distinguished *Youghiogheny* by stressing the lack of findings of special danger in OSHA.

tional dislike of increasingly widespread and complex governmental regulation in areas concerning the environment, the workplace, and traditional business practices.[112] This inconsistency regarding the rights afforded defendants in civil proceedings could result in the creation of a compromise form of proceeding. Future enforcement actions although styled "civil" may be treated as quasi-criminal proceedings. No longer would courts hold that the government is just like any other plaintiff in a civil proceeding. There are presently too many diverse enforcement actions, many of which are civil in name only. The resulting compromise would allow the application of different procedural standards in civil enforcement proceedings than those applied in the more conventional civil cases. This increase in rights would seriously affect the future of civil penalty actions. There is tension between the rights of defendants and efficient enforcement. The more procedural rights granted a defendant, the more a civil penalty proceeding takes on the characteristics found in a criminal action. The very incentive for the civil penalty proceeding is reduced.

Two recent cases stand in the forefront of this controversy. Each of these will be discussed in order to show the fluctuating state of the law in this area.

F. Two Recent Civil Penalty Cases

In *United States v. LeBeouf Brothers Towing Co.*,[113] the district court was confronted with a challenge to the civil monetary penalty and immunity provisions of the Federal Water Pollution Control Act (FWPCA). The facts were not in dispute. On June 3, 1972, one of the vessels owned by LeBeouf spilled gasoline into the Texas City harbor, a navigable water of the United States. LeBeouf notified the United States Coast Guard of the spill, thereby gaining immunity from criminal prosecution under 33 U.S.C.A. § 1161 (b)(4) (1970). Subpart (b)(4) provides that any person in charge of any vessel, onshore facility, or offshore facility shall, as soon as he has knowledge of any discharge of oil from such facility, immediately notify the United States Government of such discharge. Failure to immediately notify the government of the spill

[112] The judicial districts containing the largest number of civil penalty cases processed under the Federal Coal Mine Health and Safety Act of 1969 are located in the coal regions. These areas are traditionally conservative and unfriendly to governmental regulation.

[113] 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976).

shall result in a fine or jail term. If notification is given, however, immunity is granted to the notifying person. This immunity is broad and applies to criminal cases. The Act provides:

> Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.[114]

Thereafter, the government proposed a three thousand dollar penalty against LeBeouf under section (b)(5) of the Act for the same oil spill. This penalty was described as a civil penalty. Congress had provided:

> Any owner or operator of any vessel, onshore facility, or offshore facility from which oil is knowingly discharged in violation of paragraph (2) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of no more than $10,000 for each offense. . . .[115]

The amount of the penalty was based on three criteria: (1) the appropriateness of the penalty to the size of the business, (2) the effect on the operator's ability to stay in business, and (3) the gravity of the violation.[116] LeBeouf refused to pay any penalty and the government brought a civil action to recover the penalty.

The defendant contended that the "civil" penalty was criminal and was therefore violative of the immunity provision in section 1161(b)(4) of the FWPCA and of the fifth amendment of the Constitution. The district court, in granting defendant LeBeouf's motion for summary judgment, reasoned that the appropriate test to apply in determining the regulatory or penal character of a penalty is whether the legislative aim in providing the sanction was to punish the individual or to regulate the activity in question. Since the legislative history was unclear, the district court resorted to the seven-part test of *Mendoza-Martinez* and summarized its approach in finding that "[t]he real nature and intended objective of a statute must be unearthed to avoid Swiftonian-like deceit."[117] The district court then stated that:

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[114] 33 U.S.C.A. § 1161(b)(4) (1970).

[115] 33 U.S.C.A. § 1161(b)(5) (1970).

[116] *Id.*

[117] United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558, 563 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976).

> At first blush, the paragraph here in question appears to be nonpenal, especially in view of the purported "civil penalty" that is assessed for the proscribed activity. But to be guided in the interpretative process by such superficial implements as word classification or legal jargon truly would be an analytical pitfall in allowing form to replace substance.[118]

The district court was unable to find any legitimate governmental purpose served by the civil penalty except to reprimand a wrongdoer with a pecuniary penalty and decided that to sanction this "backdoor procedure" would ignore the immunity provision in subpart (b)(4). Moreover, the court went on to state:

> . . . this statutory situation is the only determinable instance where Congress has coupled a punitive, albeit denominated "civil," sanction with a mandatory and criminally enforceable self-notification procedure (the constitutional validity of such procedure being protected by a statutory grant of immunity conterminous with that of the Fifth Amendment), with the latter procedure invariably triggering imposition of the punitive sanction. Regardless of how the Court classifies the paragraph 5 penalty, criminal or remedial, the result is the same: this type of statutory operation is impermissible.[119]

To allow Congress to impose criminal penalties styled as "civil" penalties would be allowing Congress to accomplish indirectly what it cannot do directly, namely to impose a penalty on an offender based upon information extracted under pain of punishment. This would be a clear violation of the protective guarantees against self-incrimination provided for in the fifth amendment. The Court found that the "civil" collection proceeding was in reality quasi-criminal.

> While the paragraph 5 proceeding is civil in form, it is, at minimum, quasi-criminal in nature since any penalty authorized pursuant to paragraph 5 is incurred by the commission of an offense against the law, namely, violation of the Rivers and Harbors Appropriation Act of 1899. . . .[120]

The significance of this decision is the recognition by the Court of a "quasi-criminal" or "noncriminal" proceeding apart from the normal "civil" label. A defendant in such a quasi-

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[118] *Id.* at 563.
[119] *Id.* at 566.
[120] *Id.*

criminal proceeding clearly has fifth amendment rights and by implication other rights afforded criminal defendants.

This decision was appealed, and although the Fifth Circuit reversed the district court, a summary of the positions taken in the briefs is revealing. The government took the hard line, asserting that a civil remedy is strictly civil with no additional rights flowing to a defendant because of the enforcement aspects of the action. In its appellant brief the government urged that:

> The use of civil penalties to assure compliance with regulatory statutes is a time-honored legislative device, which has been used by the Congress in a number of recent environmental and regulatory statutes.
>
> The holdings in these cases, if affirmed, would call into question the penalty provisions of these and other statutes.[121]

The government's brief then goes on to cite the numerous cases allowing civil penalty actions.

The Appellee strongly urged that the penalty assessed was actually criminal in nature even though labelled "civil". The prime objective of the mandatory penalty of the FWPCA is punitive even though remedial purposes are asserted. Appellee then goes on to state:

> The use of the term "civil penalty" in the FWPCA gives some indication that Congress intended the sanction to be noncriminal. On the other hand, the use of the term "penalty" shows clearly that Congress intended to impose punishment upon those who spill oil into the navigable waters of the United States.[122]

Without specifically stating the premise, Appellee touched upon the basic nature of the conflict—regardless of the label, it is fundamentally unfair for the government to punish without giving a defendant elemental due process. Appellee asserted that it is fundamentally unfair to use information achieved under the guise of immunity as the basis of a civil penalty. Since the issue was presented to the Fifth Circuit in the "civil" versus "criminal" format, the circuit court did not reach the ultimate issues pre-

[121] Brief of Appellant at 6, United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976).

[122] Brief of Appellee at 5, United States v. LeBeouf Bros. Towing Co., 377 F. Supp. 558 (E.D. La. 1974), *rev'd*, 537 F.2d 149 (5th Cir. 1976).

sented, but focused instead on the "all or nothing" approach and found for the government.[123]

A second recent civil penalty case has been decided by the Third Circuit and is now before the Supreme Court. The Third Circuit Court, when confronted with similar contentions, has opted for the broad finding of a civil penalty and recognition that once the "civil" label is established, no additional rights flow to the defendant. The events leading to the Third Circuit decision began in January 11, 1972, when an employee of Frank Irey, Jr., Inc., was killed when the side of a trench in which he was working collapsed. A compliance officer of the Occupational Safety and Health Administration (OSHA) determined that a violation of the OSHA regulations had occurred. After an administrative hearing, Frank Irey, Jr., Inc. was found guilty of violating the OSHA standards and assessed a $5,000 civil penalty. The Occupational Safety and Health Review Commission affirmed the lower tribunal and Frank Irey, Jr., Inc., petitioned for review to the Third Circuit. The court in *Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Commission,*[124] summarized petitioner's challenge:

> The petitioner has chosen to attack the constitutionality of the Act on a variety of bases, asserting that the enforcement procedures involve an unlawful delegation of power to the executive branch and that the penalties, though denominated civil, are in fact criminal in nature. Some of the procedures to which the petitioner objects, that is, the power of the Commission to increase a proposed penalty, the vagueness of the general duty section, an employer's Sixth Amendment [sic] right to be confronted with his accusers, and the imposition of penalties pending determination of an appeal, are not involved in this case, and consequently, we will not decide them.[125]

Petitioner further alleged that for a corporation, the "criminal" penalties are identical to the civil penalties for "willful" violations, and concluded that since the civil penalties did not afford the defendant the rights guaranteed by the fourth, fifth, sixth and seventh amendments to criminal defendants, they were unconstitutional.

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[123] *Id.* at 19.

[124] 519 F.2d 1200 (3d Cir. 1974), *aff'd on rehearing*, 519 F.2d 1215 (1975), *cert. granted*, 424 U.S. 964 (1976) (No. 75-746, 1976 Term).

[125] *Id.* at 1203.

The Third Circuit, in rejecting petitioner's argument, recognized that there was "force and logic" in those arguments but stated that the Supreme Court has held in a series of decisions that Congress has a wide range of alternatives available to it for enforcing its legislative policy. Conceding the punitive aspects of the "civil" penalties, the court stated:

> In the case *sub judice*, candor compels us to concede that the punitive aspects of the OSHA penalties, particularly for a "willful" violation, are far more apparent than any "remedial" features. However, a deliberate and conscious refusal to abate a harzardous condition may bring about a situation where a heavy civil penalty might be needed to effect compliance with safety standards. In any event, we have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy.[126]

The Court remanded to the Occupational Safety and Health Review Commission with instructions for the Commission to give a restrictive definition to the term "willful". The process of assessing civil penalties was upheld.

Dissenting, Circuit Judge Gibbons reluctantly agreed that the civil penalty provisions in OSHA fall within the parameters delineated in the well known Supreme Court cases. However, this did not dispose of petitioner's right to a jury trial under the seventh amendment. In Judge Gibbons' opinion, there clearly was a civil jury trial guarantee. On remand the court carefully considered this seventh amendment argument and rejected it, stating:

> Our function is not to pass upon either the wisdom or desirability of such an administrative adjudicatory process. We are limited to deciding whether it is constitutional within the limitations set by the Supreme Court.[127]

These two cases are part of a trend of continuing challenges to the monetary civil penalty system. The Supreme Court is now faced with this issue. Although defendants are continually asserting the unconstitutionality of the civil penalty system, none has yet asserted the need for the creation of the noncriminal or quasi-criminal proceeding.

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[126] *Id.* at 1204.

[127] *Id.* at 1219.

IV. Two Contrasting Penalty Statutes

Now that the legal framework surrounding monetary sanctions has been explored, this framework will be applied to two specific mine safety statutes. The Federal Metal and Nonmetallic Mine Safety Act[128] will be contrasted with the controversial Federal Coal Mine Health and Safety Act of 1969.[129]

This comparison will facilitate a determination of the effectiveness of civil penalties, since both Acts are similar in that they are enforced by the same agency and are composed of equally complex regulatory provisions. The major differences between them is the absence of effective monetary penalties in the Metal Mine Act. These two Acts provide an ideal framework for analyzing the effectiveness of the monetary penalty. The effectiveness of the monetary penalty will be discussed first. Then the impact of the Coal Mine Act with its mandatory civil monetary penalties on the body of law surrounding the civil penalty area will be analyzed.

Congress, in passing the Coal Mine Act, has approved the most far-reaching civil penalty provision yet devised—the mandatory civil monetary penalty. This provision of the Act mandates that a civil monetary penalty be assessed for each violation of the Act or regulations. There is no flexibility. Once the violation, no matter how trivial, is cited, a penalty is assessed and prosecuted. This provision, designed to assure compliance with a complicated regulatory statute, is unique in modern regulatory law. The Coal Mine Act is also replete with other more specialized penalties, some of which are not mandatory.

To a great extent, the success or failure of the Coal Mine Act will determine the future course of Congress in enacting new regulatory statutes. If the Coal Mine Act becomes bogged down in legal challenges, then new devices to compel compliance will be sought. If the Act is effective, then mandatory civil penalties will become the preeminent regulatory device of the future.

A. Federal Metal and Nonmetallic Mine Safety Act

The Metal Mine Act[130] was passed in 1966 in order to reduce the high accident rate and improve the health and safety condi-

[128] 30 U.S.C. §§ 721 *et seq.* (1966).
[129] 30 U.S.C. §§ 801 *et seq.* (1970).
[130] 30 U.S.C. §§ 721 *et seq.* (1966).

tions in mining and milling operations carried on in the metal and nonmetallic mineral industries. The Metal Mine Act established a federal program of systematic inspection, either by federal authorities alone or in conjunction with state authorities in state plan states, of all mineral mining operations which affect commerce. The Act requires the development, promulgation, and enforcement of health and safety standards. The Secretary of the Interior, or an authorized representative, is required to inspect mines and to develop and enforce health and safety standards.[131]

A short summary of the background of this legislation is essential to an analysis of the effectiveness of the Metal Mine Act. Working conditions in metal mines have always been hazardous.[132] It was not until 1956 that Congress took note of this problem, and finally in 1961, after extensive hearings and strong opposition from the mining industry,[133] Public Law 87-300 was enacted. This law authorized the Secretary of the Interior to conduct a study concerning the causes and prevention of injuries and health hazards, the existing health and safety conditions and the scope and adequacy of state mine safety laws.[134] On November 13, 1963, the Mine Safety Study Board transmitted its report and recommendations to Congress. The Study itself was unique and its findings spoke poorly of the mining industry:

> The study by the Mine Safety Study Board—the only nationwide study that has ever been made on the basis of mandatory, rather than voluntary, reporting of employment and accident information by metal and nonmetallic mine operators—clearly demonstrated the widespread existence of correctable hazards to life and health in mines inspected during the study, a high casualty rate suffered by working miners from dangerous conditions beyond their own control, and the ineffectiveness of State and local efforts to reduce mine health and safety hazards.[135]

The Board found that the injury frequency rates were extremely high — 19.61 injuries per million hours in surface mining operations and 44.11 injuries per million hours in underground

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[131] 1966 U.S. Code Cong. and Admin. News, 2846, *et seq.*

[132] S. Rep. No. 1296; 89th Cong., 2d Sess. 2-5 (1966).

[133] The mining industry opposed the Metal Mine Act, arguing that the law was not necessary, that the states were regulating the industry and that it was unfair to single out the mining industry.

[134] Act of September 26, 1961, Pub. L. No. 87-300, 75 Stat. 649.

[135] H.R. Rep. No. 606, 89th Cong., 1st Sess. 2 (1965).

mining. This contrasted unfavorably with the overall injury rate for all American industries of only 6.21 injuries per million hours.[136] The Board found that over half of the fatal injuries were caused by circumstances over which the workmen had no control. They were victims of inadequate supervision, inadequate safety devices, defective equipment and generally hazardous environmental conditions. Inspections by the Bureau of Mines revealed an excessive number of hazards in mines. Hazards varied greatly and included unguarded machinery, improper handling of explosives, lack of safety devices on locomotives, and lack of air testing devices. Moreover, the federal inspectors found, upon reinspection of a mine, that the hazardous conditions once called to the mine operator's attention had gone uncorrected. Mine operators had a lax attitude toward safety hazards. Only about half of the reinspected mines had corrected the identified hazards.

The Board conducted a thorough analysis of the scope and adequacy of the state mine safety laws. The conclusion was that enforcement by the states was unsatisfactory. If there was a state law, (and in many states there was none) all workers were not covered, or else there was inadequate funding and personnel. Salaries of state mine inspectors were so low as to cast doubt on the ability of the state to attract qualified personnel. The Board summed up its dismal results by stating:

> The number and severity of the injuries experienced each year by persons employed in the extractive industries should be alarming to an America that prides itself on its . . . concern for the welfare of its citizens. In the face of 10,000 lost-time injuries and more than 200 deaths in a single year, it would be difficult to ignore the need for positive action. . . . [T]he present structure of State-law coverage and enforcement is clearly inadequate to deal comprehensively with the problem of safety in the mineral industry.[137]

To remedy these problems, Congress passed the Metal Mine Act. The Act covered, "[E]ach mine the products of which regularly enter commerce, or the operations of which affect commerce. . . ."[138] Although this grant of authority includes all mines, the Secretary of the Interior may decline to assert jurisdiction over any class or category of mine where the effect on com-

[136] *Id.* at 3.
[137] *Id.* at 5.
[138] 30 U.S.C. § 722(a) (1966).

merce is insufficient to warrant the exercise of jurisdiction.[139] The Secretary has never declined jurisdiction over any mine. The word "mine" is defined in the Act as: (1) an area of land from which minerals other than coal or lignite are extracted in nonliquid form, (2) private ways and roads appurtenant to such areas, and (3) land, excavations, underground passageways, workings, structures, facilities, equipment used in the work of extracting such minerals.[140] This definition is broad and includes such diverse mine types as salt, uranium, copper, gold, sand quarries, and gravel pits, regardless of size. Jurisdiction has been asserted over mines as small as one person operations and extended to all fifty states and the territories. The Metal Mine Act provides for the inspection of underground mines once each year. For purpose of making any inspection or investigation, authorized representatives are entitled ". . . to admission to, and shall have the right of entry to, upon, or through, any mine which is subject to this Act."[141]

The Secretary of Interior is directed to develop, in detail, health and safety standards for all mines subject to the Act for the purpose of protection of life, the promotion of health and safety, and the prevention of accidents in mines which are subject to the Metal Mine Act. Meticulous procedures are outlined, establishing the manner in which these regulations are to be promulgated. The final product is lengthy and comprehensively affects all mines.[142]

The Metal Mine Act does not provide any mandatory health or safety standards. Rather, the Act gives the Secretary of the Interior a mandate to develop appropriate standards. Congress intended that the Secretary develop standards for the major health hazards such as silicosis and other respiratory diseases, not just for the more traditional safety problems.[143]

To further promote the twin goals of health and safety, the Metal Mine Act provides for state plans. These state plans are provided for in Section 16 of the Act, which in pertinent part states:

> In order to promote sound and effective coordination in Federal and State activities within the field covered by this Act, the

[139] 30 U.S.C. § 722(b) (1966).
[140] 30 U.S.C. § 721 (1966).
[141] 30 U.S.C. § 724 (1966).
[142] *See* 30 C.F.R. Parts 55, 56, 57 and 58 (1976).
[143] H.R. Rep. No. 606, 89th Cong., 1st Sess. 7-8 (1965).

> Secretary shall cooperate with the official mine inspection or safety agencies of the several states.[144]

State plan agreements were reached in six states. Most states merely abolished their state agencies, thus leaving the federal government to take over the expense and headaches of regulating the mines. Of the states with plans, only the major mining states have vigorously enforced the law. Friction has arisen between the state and the federal government on the issue of uncoordinated inspections. Some mine operators, at the urging of state officials, have refused to permit federal inspectors to enter their mines unless accompanied by state mine inspectors. Overall, however, peaceful relations have continued with both state and federal agencies inspecting the mines.

The Secretary's arsenal for enforcing the Metal Mine Act is limited. Section 14 provides the only penalties for violation of the Act and its regulations. Section 14(a) states:

> Whenever an operator (1) violates or fails or refuses to comply with any order of withdrawal and debarment issued under section 8 or section 9 of this Act, or (2) interferes with, hinders, or delays the Secretary, or his duly authorized representative, in carrying out his duties under this Act, or (3) refuses to admit an authorized representative of the Secretary to any mine which is subject to this Act, or (4) refuses to permit the inspection or investigation of any mine which is subject to this Act, or of an accident, injury, or occupational disease occurring in or connected with such a mine or (5) being subject to the provisions of section 13 of this Act, refuses to furnish any information or report requested by the Secretary, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order or other order, may be instituted by the Secretary in the district court of the United States for the district in which the mine in question is located or in which the mine operator has its principal office.[145]

The injunctive provisions provided for in Section 14(a) are cumbersome and lengthy. The average delay between the act of refusing entry and the operator's appearance in federal district court is six months or more. If the operator decides to cooperate before ordered to do so by the court, no further relief is available. Even if the court orders compliance, there is no monetary penalty

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[144] 30 U.S.C. § 735 (1966).

[145] 30 U.S.C. § 733(a) (1966).

for the past misbehavior. Contempt citations are rare and occur only in the most aggravated circumstances.

Since there is no penalty for violating an order of the Secretary, there is no monetary incentive for a mine operator to allow inspections or comply with provisions of the Act. For example, if an operator refuses to allow federal inspection for six months, the mine can be operated without regard to federal standards during this time. Compliance with federal standards is costly, and this "free" time outweighs any cost incurred in litigation. Fortunately, only a few mine operators exploit this weakness in the statute. Most operators comply out of a desire to avoid adverse publicity, a desire to avoid "problems with the government", a genuine concern for their employees' safety, or to avoid union problems. These constraints affect larger mines to a greater extent than small ones, and it is the small mine operator that is the subject of most litigation.

The only monetary penalties provided in the Act are those outlined in Section 14(b), which states:

> Whoever violates or fails or refuses to comply with an order of withdrawal and debarment issued (1) under subsection (a) of section 8 or (2) under subsection (b) of section 8 if the failure to comply with an order of abatement has created a danger that could cause death or serious physical harm in such mine immediately or before the imminence of such danger can be eliminated, shall upon conviction thereof be punished for each such offense by a fine of not less than $100, or more than $3,000, or by imprisonment not to exceed sixty days, or both. In any instance in which such offense is committed by a corporation, the officer or authorized representative of such corporation who knowingly permits such offense to be committed shall, upon conviction, be subject to the same fine or imprisonment, or both.[146]

These penalties are criminal and only useful in the very limited circumstance where a mine operator violates an imminent danger order of withdrawal, ordering that all or part of the mine cease operation. So limited is this provision that it has never been used and not one penalty has ever been collected. Orders and notices can be violated by operators with impunity and no penalty will be assessed.

[146] 30 U.S.C. § 733 (1966).

How effective has this statute been? Federal inspectors now inspect underground mines four times a year and surface mines are inspected once a year if possible. The number of qualified federal inspectors is limited and this severely restricts the frequency of inspection. Smaller mines operate without any inspections because their existence is unknown. There are not enough federal inspectors and equipment to keep track of all mines. The larger operations are, however, inspected either by federal inspectors or by state and federal inspectors working together.

These inspections are infrequent and not nearly as thorough as inspections of coal mines. Many federal inspectors feel that state inspectors tip off the mine operators of the impending inspection. During the inspection, federal inspectors issue notices of violation for conditions which violate the regulations. The mine operator is given a reasonable time to correct a cited condition and, if the condition is corrected, the notice of violation is terminated.[147] This termination ends the affair. There is no penalty for having violated the health and safety regulations initially, even if the violation was caused by willful conduct on the part of the mine operator. A mine operator can correct violations as cited and ignore the safety regulations until another federal inspector appears at the mine. Safe working conditions at the mine are created only because of the mine operator's desire to have a safe mine, by societal pressures, or by union pressure on the operator.

Not only is there no penalty for violating the Act, but if the mine operator ignores the notice of violation, the federal inspector must then issue an order of withdrawal. The Act provides in pertinent part:

> (b) If, upon any such inspection or investigation, an authorized representative finds that there has been a failure to comply with a mandatory standard which is applicable to such mine, but that such failure to comply has not created a danger that could reasonably be expected to cause death or serious physical harm in such mine immediately or before the imminence of such danger can be eliminated, he shall find what would be a reasonable period of time within which such violation should be totally abated and thereupon issue a notice fixing a reasonable time for the abatement of the violation. If, upon the expiration of such period of time as originally fixed or extended, the au-

[147] 30 U.S.C. § 727 (1966).

> thorized representative finds that such violation has not been totally abated, and if he also finds that such period of time should not be further extended, he shall also find the extent of the area which is affected by such violation. Thereupon, he shall promptly make an order requiring the operator of such mine to cause all persons in such area, excepting the following persons whose presence in such area is necessary to abate the violation described in the order, to be withdrawn from and to be debarred from entering such area.[148]

Once this "order" is issued, only three classes of personnel are allowed to enter the affected area. These are: (1) persons whose presence in such area is necessary, in the judgment of the operator, to abate the violation, (2) any public official whose duties require him to enter such area and (3) any legal or technical consultant or representative of the employees, who is a person qualified to make mine inspections or is accompanied by one, and whose presence in such mine is necessary in the judgment of the mine operator for the proper investigation of the conditions cited in the order.[149]

An order of withdrawal, which is given to a recalcitrant mine operator for refusing to abate the conditions cited in the notice of violation within a reasonable time, is intended to withdraw the hazardous equipment from service, thereby depriving the mine operator of its use until the cited condition is repaired. The theory has some appeal, but is flawed. If the mine operator chooses to ignore the order of withdrawal, as discussed earlier, and operates the forbidden equipment while making the needed repairs at his leisure, the Secretary is without a remedy. By the time a federal injunction is brought, the order is terminated and the condition repaired. The operator is subject to no penalty and has been rewarded by having the use of unsafe equipment for many months.[150] The absence of any penalty limits the effectiveness of the order. The threat of criminal penalties has only been effective in cases involving serious mine hazards or imminent danger situations. Serious mine hazards are remedied by imminent danger orders of withdrawal. This is the strongest sanction available to the Secretary. The Act states:

> If, upon any inspection or investigation of a mine which is sub-

[148] 30 U.S.C. § 727(b) (1966).

[149] 30 U.S.C. § 727(b)(1) (1966).

[150] This is due to the fact that 30 U.S.C. § 727(b) (1966) provides no penalties except in the case of an operator violating an imminent danger order of withdrawal.

> ject to this Act, an authorized representative of the Secretary finds that conditions or practices in such mine are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated, such representative shall determine the extent of the area of such mine throughout which the danger exists, and thereupon issue an order requiring the operator of such mine to cause all persons, except the following persons whose presence in such area is necessary to eliminate the danger described in such order, to be withdrawn from, and to be debarred from entering such area.[151]

This order allows a federal mine inspector to shut down an entire mine until the hazardous condition is corrected. It is the most severe sanction available to the federal government to insure safe mines under the Metal Mine Act.[152]

If a mine operator chooses to ignore this order of withdrawal, the Secretary may seek a temporary restraining order under Section 14(a) of the Act from the appropriate district court to compel compliance. For the most part, courts act rapidly in this situation. There is only an average delay of two weeks between the refusal to comply and the issuance of the court order.[153] Once the court order is issued, the operator must comply or be subject to a contempt citation.

The mine operator is also exposed to criminal penalties for violating this imminent danger order of withdrawal. The corporate veil does not protect the representative of the corporation who authorized the violation of the order of withdrawal. The language of the criminal penalty statute is tough, but this remedy has never been implemented. Mine operators have violated imminent danger orders of withdrawal and have not been fined. The reasons for this are complex.

The Justice Department, because of its large case load, will only prosecute criminal actions which are extremely aggravated.[154]

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[151] 30 U.S.C. § 727(a) (1966).

[152] *See* Comment, "*Enforcement Powers Under the Federal Coal Mine Health and Safety Act of 1969: Does Procedural Due Process Apply in the Coal Fields?*", 13 DUQUESNE L. REV. 303 (1975).

[153] The rapid response is possible because Interior Department attorneys are allowed to represent the Department in federal court. The Justice Department has routinely granted this authority on a case-by-case basis.

[154] Each proposed criminal action must be thoroughly investigated and then submitted to the Justice Department. So far no actions have been proposed under

The Metal Mine Act and the Coal Mine Act are of low priority, and the "Speedy Trials Act"[155] forces the prosecution of the most serious criminal actions.

The Interior Department is reluctant to push actions that the Justice Department is unlikely to accept because it wishes to preserve its credibility with the Justice Department when very important criminal actions arise. Moreover, the violators of imminent danger orders of withdrawal are almost exclusively small mine operators. The Interior Department is reluctant to bring criminal actions against small local operators because jury convictions are difficult to obtain in the local courts.

These conditions have resulted in no prosecutions under this criminal provision. No cases have been deemed aggravated enough to warrant criminal indictment.[156]

How effective has the Metal Mine Act been in compelling compliance with the mandatory health and safety standards? The Secretary of the Interior in a letter to the President of the Senate stated:

> We agree that the present legislation for the noncoal sector, although progressive in its day, must be replaced with legislation equal in caliber to the Federal Coal Mine Health and Safety Act of 1969 and the Occupational Safety and Health Act of 1970 . . . .[157]

A major problem with the Metal Mine Act is that enforcement sanctions are cumbersome. No penalties are imposed for past conduct. The major factors cited for the ineffectiveness of the Metal Mine Act are: (1) the inadequate inspection force, (2) the large number of mines, and (3) the lack of meaningful sanctions. The lack of civil penalties has been repeatedly blamed as a major weakness in the Act. Proposals for amending the Metal Mine Act stress the need for mandatory civil penalties and cite approvingly the success of the Coal Mine Act in achieving compliance with the mandatory health and safety standards.

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the Metal Mine Act. Criminal actions under the Coal Mine Act are carefully scrutinized.

[155] *See* 18 U.S.C. §§ 3152-56 (1970), *as amended*, (Supp. 1976).

[156] Recently, there has been an increase in the number of metal mine operators refusing to comply with closure orders. This increase may result in criminal actions against them.

[157] Letter from the Secretary of the Interior to President of the Senate, August 2, 1973.

In advocating a bill to strengthen the Metal Mine Act, the Vice President of the United Steelworkers of America told the House Committee on Education and Labor:

> We are interested in a penalty system not because of its *punitive* value but rather because of its *preventive* value. Citations and fines can bring about a better "voluntary" compliance before an inspection is made and a violation discovered. After the violation is discovered we are, of course, more interested in abatement of the violation but the threat of fines does create a situation more conducive to compliance.[158]

The Metal Mine Act has not been as effective in achieving safety in the Nation's metal mines as the Coal Mine Act has been for the Nation's coal mines. The primary reason for this ineffectiveness is the lack of monetary civil penalties.

B. Federal Coal Mine Health and Safety Act

The Federal Coal Mine Health and Safety Act of 1969 is strikingly similar to the Metal Mine Act. The difference lies in the Coal Mine Act's enforcement provisions which are in the forefront of the law of monetary penalties. The Coal Mine Act is in almost every respect more vigorously enforced than the Metal Mine Act. It is more effective in its impact on industry. It has led to the collection of more civil penalty monies than any other remedial legislation. The mandatory civil penalty provisions are unique to the law and have created turmoil among coal industry lawyers. This turmoil has extended to the Supreme Court.

In enacting the Coal Mine Act, Congress declared:

> (a) the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner.[159]

The hazardous nature of coal mining was recognized by Congress as long ago as 1865 when a bill to create a Federal Mining Bureau was introduced in Congress. Little was done, however, until 1910 when Congress established a Bureau of Mines as the result of a series of coal mine disasters. This Act was essentially hortatory

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[158] Testimony of John S. Johns, Vice President, United Steelworkers of America before House Committee on Education and Labor, Subcommittee on Manpower, Compensation and Health and Safety, November 13, 1975. This testimony is unpublished.

[159] 30 U.S.C. § 801(a) (1970).

and amounted merely to federal recognition of the serious hazards involved in mining. In 1939, Congress passed the Federal Coal Mine Safety Act. This granted federal inspectors the right to make inspections of mines but had no provision for establishing safety standards. From 1946 to 1947 the Federal Government operated a substantial portion of the Nation's coal mines. During this time, a Federal Mine Safety Code was voluntarily enforced.

In 1947, Congress requested coal operators and state agencies to report the extent of compliance with Bureau of Mines' recommendations. There was only one-third compliance with Bureau recommendations among the seventeen states reporting. The death of 119 miners in a mine disaster in 1951 led to enactment of the 1952 Federal Coal Mine Safety Act. This Act applied only to coal mines with greater than fifteen employees, relied on state accident prevention programs, and contained exemptions to safety provisions and complex procedural provisions delaying the enforcement of orders of withdrawal. This law was amended in 1966 to include coal mines with fewer than fifteen employees and created a reinspection order of withdrawal for repeat violators of the safety provisions. Even after these amendments, large numbers of safety and health violations were outside the scope of the federal statute. This nonfederal area of coal mine safety was passed over by Congress to be regulated by the states and by the Bureau of Mines Advisory Coal Mine Safety Code.

> Notwithstanding many desirable features in the Advisory Code, the abysmally poor record of abatement of violations observed during inspections negated its value as a meaningful safety tool. During the period 1960 through 1968, 91,940 violations of Federal and State law were observed during inspection; 78,337 were abated immediately and the remainder were abated after the issuance of a notice of violation. On the other hand, during the same period, there were over 1.3 million violations of the Code observed by Federal inspectors; only 231,000 were abated.[160]

Attempts were made to remedy the weakness of the Coal Mine Act, but all languished in Congress. Then, on November 20, 1968, Consolidation Coal Company's Number Nine Mine near Farmington, West Virginia, exploded, killing seventy-eight miners. This disaster provided the final push for the present Coal Mine Act:

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[160] House Committee on Education and Labor, Legislative History, Federal Coal Mine Health and Safety Act, S. Rep. No. 91-411, 91st Cong., 1st Sess. 6 (1969), [hereinafter cited as *Legislative History*].

> Once again, the adage is being proved that "dead miners have always been the most powerful influence in securing passage of mining legislation."[161]

The purpose of the present Act is (1) to establish interim mandatory health and safety standards with directions to develop and promulgate improved mandatory health and safety standards, (2) to require each operator of a coal mine and every miner in such mine to comply with these standards, (3) to cooperate with and provide assistance to the states, and (4) to improve and expand research and development training programs aimed at preventing coal mine accidents.[162] The Coal Mine Act sets out detailed mandatory health and safety standards which have been expanded by regulation. These standards and regulations affect every conceivable phase of mining.[163] It has been estimated that there are many thousands of possible violations between the entry of the mine and the face area, and it has been stated that it is impossible to operate a mine without violating the law.

To enforce these safety regulations, the Coal Mine Act gives a federal mine inspector the right to enter a mine.[164] All underground coal mines in the nation are inspected at least four times a year, and sometimes more often. All known coal mines are inspected. During an inspection, a federal inspector issues notices of violation for each violation of the Act or its regulations. The inspector may also close all or part of a mine in four different major circumstances. First, he may issue an imminent danger order of withdrawal if he finds that an imminent danger exists. Second, he may issue a "B" order of withdrawal in accordance with 30 U.S.C. 814(b) (1970), for failure of the operator to abate the conditions cited in a notice of violation in a reasonable time. This "B" order prohibits the working of a mine area or piece of equipment until the condition cited in the original notice of violation is corrected. Third, the inspector may issue a "C" order in accordance with 30 U.S.C. 814(c) (1970). This order is issued when an inspector finds a violation of the health and safety standards which does not create an imminent danger, but which does significantly and substantially contribute to a mine safety or health hazard and such violation is caused by an unwarrantable failure of the operator. The

[161] *Id.* at 7.
[162] 30 U.S.C. § 801(g) (1970).
[163] *See* 30 C.F.R. Parts 70, 71, 74, 75 and 77 (1975).
[164] 30 U.S.C. § 813(a)-(b) (1970).

final order of withdrawal is an order issued to insure the safety of any person in a coal mine after an accident has occurred. This is a "control" order issued under 30 U.S.C. 813(f) (1970), which allows the inspector to conduct an investigation in a mine and to prohibit all unneeded personnel from the affected area until the investigation is complete.

These four orders of withdrawal along with the notice of violation are the major tools available to an inspector charged with enforcing safety in mines. There are other types of orders which can be issued but these are almost never used.[165] Compliance with these orders of withdrawal is compelled by both civil penalties and injunctive relief. The injunctive relief is as cumbersome and time-consuming as it is in the enforcement of the Metal Mine Act. But the similarity ends here.

The civil penalty provisions of the Coal Mine Act are second to none. All violations of the Act are fined. The Act states in pertinent part that:

> The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provisions of this Act, except the provisions of title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense . . . .[166]

Not only are violations of the health and safety standards assessed penalties but *violations of any other provision are fined.* This provision eliminates many of the loopholes that are found in the Metal Mine Act. First, all violations are fined. An operator issued an order of withdrawal who ignores the order will be fined even though the delay in the injunctive relief is months. Moreover,

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[165] 30 U.S.C. § 813(e) (1970) allows the federal inspector to issue an order of withdrawal to facilitate rescue operations. 30 U.S.C. § 814(i) (1970) provides for the issuance of a closure order if a mine operator is unable to comply with the applicable limit on the concentration of respirable dust in the mine atmosphere. 30 U.S.C. § 814(h) (1970) allows the federal mine inspector to issue a closure order when (A) existing conditions are not imminently dangerous, (B) existing conditions cannot be effectively abated through existing technology, and (C) reasonable assurances cannot be provided that continuance of mining operations will not result in an imminent danger.

[166] 30 U.S.C. § 819(a)(1) (1970).

the amount of the penalty will increase if the operator acts in bad faith. The manner of assessing penalties will be discussed later in this section.

Furthermore, the provision of penalties for violation of "any other provision of the Act" will become operative. It is a violation of the Coal Mine Act to ignore an order of withdrawal. A "letter" violation will be issued citing the operator for his violation of the order of withdrawal. Here again the fine is substantial. The recalcitrant operator is fined heavily each time he violates the Act. The mine operator's refusals to allow inspections are fined by "letter" violation. Each act which stymies effective enforcement of the Metal Mine Act is penalized under the Coal Mine Act.

The penalty provisions of the Coal Mine Act do not end there. Willful violators are punished by both criminal fines and jail terms. The Act provides that:

> (b) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this subchapter, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a) of this section or section 820(b)(2) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or by both.[167]

Unlike the record under the Metal Mine Act, there have been criminal convictions under the Coal Mine Act. Of course, criminal convictions are rare and make up only a very small part of the fines assessed. Still, the general vigor of the Coal Mine Act in assessing mandatory civil penalties has carried over to criminal prosecutions.[168]

Another type of penalty singles out the corporate mine operator. Whenever a corporate operator violates a mandatory health or

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[167] 30 U.S.C. § 819(b) (1970).

[168] The final outcome of the criminal action against Finley Coal Company, reported in *United States v. Finley Coal Company*, 493 F.2d 285 (6th Cir. 1974), resulted in a *nole contendre* plea on four counts; twenty-four counts were dismissed. Mr. Finley paid a $12,500 fine.

safety standard or knowingly violates or refuses to comply with any order issued under the Act, the director, officer, or agent of such corporation who knowingly authorized such violation shall be subject to civil penalties. These "civil" violations are administratively assessed. The corporate officer authorizing the violation of the Act receives a notice of violation and a proposed assessment. A hearing before an administrative law judge is conducted and an order fining the corporate officer a substantial sum is entered. Once the order becomes final, the corporate officer or agent must pay, or the case will be referred to the appropriate district court for collection.

The initiation of the individual corporate penalty has surprised many officers of corporate mines and has been used to complement the injunctive process.[169] Challenges have been made, asserting that the individual civil penalty is in reality a criminal penalty. There has, however, been no definitive ruling to date. Surprisingly, many of the corporate officers have paid the assessed penalty without engaging in litigation, possibly to avoid the stigma of being singled out as a violator of the Act. These penalties are considered highly effective by the Mining Enforcement Safety Administration, since now mine operators who refuse to permit federal mine inspectors to enter their mine or who ignore closure orders may become engaged in litigation before both federal district court and before an administrative forum.

Another penalty providing a criminal sanction is assessed against persons who make false statements, representations or certifications in any application, record, report, plan, or document required to be filed and maintained by the Act. A violation of this provision carries with it a fine of up to $10,000 and imprisonment for up to six months. This provision is increasingly important because of the large amount of record keeping required to insure that the mine operator has systematically complied with the Act. No convictions have occurred under this provision, although investigations are taking place. This section is difficult to enforce because the investigation is tedious and because the Justice Department is reluctant to press charges. Record keeping violations are not glamorous.

[169] 30 U.S.C. § 819(c) (1970) provides that whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act, the corporate director, officer, or agent who knowingly authorized such violation is subject to civil penalties, fines, and imprisonment the same as a person in violation of 30 U.S.C. § 819(a) and (b).

A criminal penalty is provided for anyone who knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal mine which is represented as complying with the provisions of the Act and does not so comply. The person may be fined up to $10,000 and be imprisoned for up to six months.[170] No violations of this section have been prosecuted and no violations of this provision are known since there is no market for unapproved mining equipment. An operator using such equipment would be subject to civil penalties and injunctive action.[171]

The final penalty provision provides that:

> (2) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.[172]

Although these penalties were not collected during the early enforcement of the Act, many penalties are now assessed under this provision. The basic idea behind this comprehensive program of monetary penalties was to remove the incentive to violate the Coal Mine Act. Congress sought to make safety pay in the short run.

To be effective, monetary penalties must be quickly and efficiently enforced. Delay in collection removes the sting of the penalty. Generally, administrative agencies have not yet developed an efficient means for handling civil penalty cases because the legal process necessary for collecting these penalties is cumbersome. Still, civil penalties are effective in circumventing the problems inherent in the assessment of criminal penalties.[173]

Furthermore, mathematical precision in assessing penalties has proven to be difficult to achieve. Not only must the amount of the penalty be similar for similar offenders, the amount assessed must be greater than the amount saved by skimping on safety. Some comparison between the subjective opinions of the mine operator as to the relationship between the amount assessed and the amount saved by avoiding the health and safety and the objective

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[170] 30 U.S.C. § 819(c) (1970).
[171] 30 U.S.C. § 819(e) (1970).
[172] 30 U.S.C. § 819(a)(2) (1970).
[173] *Goldschmid Report* at 899.

fact must be calculated. Finally, the use of backup sanctions as aids to civil penalties must be well planned and coordinated. The criminal sanction should be a real threat to operators who systematically avoid the requirements of the Act.

For each of these factors, the Coal Mine Act is designed to be effective, whereas the Metal Mine Act is ineffective. The approach of the Coal Mine Act is an attempt to compel compliance. An analysis of the assessment and collection procedures will set the framework for understanding the impact of the Coal Mine Act on the law of monetary penalties. The assessment and collection procedure of the Coal Mine Act is the largest and most comprehensive of any congressional regulatory program. The impact of these procedures on the law of monetary penalties is just beginning to be felt.

All civil penalties are assessed by the Office of Assessments of the Interior Department. The assessment process begins when packets of notices of violation and orders of withdrawal are sent from the various field offices of the Mining Enforcement and Safety Administration (MESA) to the Assessment Office. Along with these packets, information is given to enable the assessment officer to determine the amount of penalty for each violation.[174] Basic information regarding each mine is, of course, on file at the appropriate Assessment Office. In determining the amount of the civil penalty, the assessment officer must consider six criteria. The Act states in pertinent part:

> . . . In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.[175]

The assessment officer must consider these six criteria for each individual violation.

Violations are grouped in packets of approximately seven for each mine. Once the violations are assessed, a "Proposed Order of Assessment" (POA) is sent by certified mail to the mine operator.

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[174] 30 C.F.R. Part 100 (1975).

[175] 30 U.S.C. § 819(a)(1) (1970).

This is the initial fine. Along with the POA is a stamped, self-addressed card. The operator can fill out this card and request a conference with the assessment officer regarding the amount assessed or request an administrative hearing.

Normally, the mine operator requests an assessment conference. During this conference, the mine operator can present any information helpful to his cause to the assessment officer in an attempt to reduce the penalty. Most penalties are settled during these conferences by both parties entering into a settlement agreement payable within ten days. If no agreement is reached, the assessment officer issues a Revised Proposed Order of Assessment (RPOA) and allows the mine operator thirty days in which to pay. If the RPOA is not paid, then the file is referred to the Solicitor's Office of the Department of Interior for an administrative hearing. The administrative hearing is required by Section 109(a)(3) of the Act which states:

> A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. . . . Any hearing under this section shall be of record and shall be subject to section 554 of Title 5 [of the United States Code].[176]

These hearings can be long and drawn-out, since they often involve expert witnesses on both sides. Because these hearings are time-consuming, and because of the large number of cases, the Solicitor's Office has power to settle cases. If the case is not settled, however, a hearing is held for each case without exception.[177] The majority of cases are settled.

After the hearing, the administrative law judge renders an initial decision which will become final in thirty days unless appealed. An appeal may be made to the Interior Board of Mine Operations Appeals which exercises the full authority of the Secretary. If a penalty is imposed the mine operator must pay the penalty or it is referred to the Justice Department for collection. The Act provides that the Secretary may file a petition for enforcement

[176] 30 U.S.C. § 819(a)(3) (1970).
[177] 30 C.F.R. § 100.7 (1975).

against any person against whom a civil penalty is assessed who fails to pay the penalty within the prescribed time. The petition may only claim the amount assessed by the Secretary, there being no additional penalty for not paying. This provision has caused many of the mine operators to delay payment of the penalty until an action is filed in district court.

The court in which the petition for enforcement is filed has jurisdiction to enter a judgment enforcing, modifying, or setting aside the order in whole or in part. The court is instructed to "consider and determine *de novo* all relevant issues, except issues of fact which were or could have been litigated . . . under section 816 of the Act, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury."[178] Based on the jury's findings, the court shall determine the amount of penalty to be imposed. This provision for *de novo* review has proved to be a major stumbling block to the enforcement of the Act. United States Attorneys' Offices are flooded with these collection cases. This has created a bottleneck in the enforcement pipeline. The reasons are complex but revolve around the rights granted to the mine operator during the assessment process.

On March 9, 1973, the issues involving the assessment collection procedure came to a head in the landmark decision of Judge Robinson in *National Independent Coal Operators Association v. Morton.*[179] This action, brought by the National Independent Coal Operators Association (NICOA), an association of coal operators, challenged the procedures adopted by the Bureau of Mines in assessing civil penalties for violations of the health and safety standards under the Act. This challenge involved at the time more than 96,000 POA's comprising over 227,000 notices of violations. The amount assessed was approximately $25,500,000, with 100,000 new notices of violation being issued yearly.

The crux of the challenge was that the procedures adopted by the Secretary allowed the POA to ripen into a final order of the Secretary without any formal hearing in the event that the mine operator defaulted. The assessment procedures at that time allowed a final order, assessing a civil penalty against a mine operator, to be entered against a defaulting mine operator without any hearing by an administrative law judge. The default order was

[178] 30 U.S.C. § 819(a)(4) (1970).

[179] 357 F. Supp. 509 (D.D.C. 1973).

entered by the Assessment Office and not by an administrative law judge. The mine operator was, however, given an opportunity for a hearing. This procedure was challenged, and the district court held that even though it was undisputed that the operator charged with a violation is given an opportunity for a hearing, the Secretary must, under section 109(a)(3), *make findings of fact* as to the occurrence of a violation and the amount of the penalty in each case, whether the operator has exercised his opportunity for hearing or not. The court further found that this statutory provision was necessary to ensure a *considered determination* by the Secretary in every case both as to the fact of violation and the amount of the penalty.[180] Recognizing the tremendous burden this decision placed on the Secretary, the court merely concluded that it was not its duty to rewrite the statute for the administrators. The Secretary was required to make detailed findings of fact even where the mine operator made no effort to request a formal hearing after being notified of the hearing provisions of the Act.

This decision threw havoc into the entire assessment procedure and cast doubt on all cases referred to the United States Attorney's Office for collection. The entire assessment proceeding was changed to include a formal hearing procedure for each case.[181] The court of appeals on February 11, 1974, reversed Judge Robinson and held that no formal decision was required unless the mine operator takes advantage of that opportunity by requesting one. Once given notice of his right to a hearing, the operator's failure to request a hearing suggests that he does not dispute the fact of violation nor disagree with the appropriateness of the specific penalty proposed. The rationale for the decision of the court of appeals is that Congress does not intend for administrative agencies to perform a meaningless task.[182]

This decision was placed in doubt one month later when the Court of Appeals for the Third Circuit declared the assessment procedures unconstitutional. The court, in *Morton v. Delta Mining, Inc.*,[183] held that the final orders of the Secretary assessing civil penalties under the Coal Mine Act were invalid because they were entered without making and publishing factual findings, even though the mine operator had not requested a hearing. The court

[180] *Id.* at 512.

[181] 30 C.F.R. § 1007(c) (1975) now requires a hearing in each case.

[182] 494 F.2d 987, 991, 992 (D.C. Cir. 1974).

[183] 495 F.2d 38 (3d Cir. 1974).

found that the language of the Act manifested congressional intent that every final assessment order of the Secretary be accompanied by findings of fact. Congress, the court urged, required explicit and public findings of fact, as necessary to insure that the administrative process did not degenerate into arbitrariness. The court concluded that though flexibility and the capacity to make rapid determinations are vital weapons in every administrator's arsenal, proper standards are implicit in every case of administrative discretion. The appellate court further found that even though the final orders of the Secretary were subject to *de novo* review by a district court before collection, the assessment procedure would not be saved since such review is rendered practically impossible, or at least vastly more difficult, where the agency's decision is not accompanied by express findings.[184]

Because of the split between the two circuit courts and the importance of the Coal Mine Act, the Supreme Court granted certiorari. Oral argument was held during the Fall 1975 term. The Supreme Court on January 26, 1976, rendered two unanimous decisions upholding the assessment procedure of the Coal Mine Act.

Chief Justice Burger, writing for the Court in *National Independent Coal Operators Association v. Kleppe*,[185] held that the language of the statute, especially in light of its legislative history, requires that the Secretary of the Interior make formal findings of fact only when the mine operator requests a hearing.

> The requirement for a formal hearing under § 109 (a)(3) is keyed to a request, and the requirement for formal findings is keyed to the same request.[186]

The Court noted the necessity for default procedures.

> Effective enforcement of the Act would be weakened if the Secretary were required to make findings of fact for every penalty assessment including those cases in which the mine operator did not request a hearing and thereby indicated no disagreement with the Secretary's proposed determination.[187]

The Court in *Thomas S. Kleppe v. Delta Mining, Inc.*,[188] reversed

[184] *Id.* at 42.
[185] 423 U.S. 388 (1976).
[186] *Id.* at 392.
[187] *Id.* at 393.
[188] 423 U.S. 403 (1976).

the Third Circuit decision and remanded the case for determination in accordance with the NICOA case.

Each of these decisions has removed a tremendous roadblock to the enforcement of the Coal Mine Act. No longer are all assessments suspect. New legal challenges, however, will certainly arise. For example, the scope of *de novo* review will have to be established. But there can be no doubt that the decisions of the Supreme Court were a boost for enforcement of the Coal Mine Act.

Notwithstanding the positive impact of the ruling of the Supreme Court, the adverse impact of the lower courts' rulings have been substantial. The collection procedures have been held up for four years because of a narrow and strict construction of the Act by the District Court for the District of Columbia and the Third Circuit Court of Appeals. These courts treated the civil penalty provision as criminal in nature and, therefore, the statute was construed narrowly. The implicit assumption in the cases overturning the assessment procedure was that since the government is bringing the action, the statute must be construed narrowly as a criminal action, even though an "opportunity for a public hearing" is provided as required by the statute and the mine operator has defaulted by failing to request a hearing. The civil nature of the proceeding went unnoticed during the analysis of the District Court of the District of Columbia and that of the Third Circuit. The objections of the mine operators were so technical that during oral argument before the Supreme Court, Justice Marshall queried counsel for NICOA as to whether or not this case was just a "lawyers' quarrel."

The criminal penalties under the Coal Mine Act have fared worse. A criminal action brought under Section 109(b) of the Act against a mine operator for the willful violation of the mandatory health and safety standards which resulted in the death of thirty-eight miners was dismissed in part by the courts because the applicable health and safety standards were improperly promulgated. In *United States v. Finley Coal Company*,[189] the Sixth Circuit upheld the dismissal of one count of the indictment on the grounds that the regulations alleged to have been violated were not adopted in accordance with Section 101(c) of the Act.[190] This decision though limited to the specific regulations involved, af-

[189] 493 F.2d 285 (6th Cir. 1974).

[190] *Id.*

fected all "improved" regulations promulgated to make coal mines safer. The court recognized that great weight must be given to the agency's interpretation of the statute it is charged with administering, but concluded that the procedures for promulgating regulations by Congress must be strictly observed.

> Accordingly, we concluded that an administrative officer's interpretation of an Act of Congress to permit him to exercise broad power to flesh-out a statute by revising interim statutory standards should be tested with less indulgence. This is particularly true when the interpretation permits promulgation of regulations and their willful violation can result in criminal prosecution. In this instance, we hold that the procedures established by Congress must be strictly observed.[191]

Strict construction of criminal statutes is to be expected. It is instructive, however, to compare the construction given to the Coal Mine Act by the lower courts in the civil action as opposed to the criminal action. In both actions the statute was narrowly construed even though other interpretations were possible. The reason for this anomaly must be in the attitude that civil penalties are actually criminal in nature. These challenges to the monetary penalty system have forced revision upon revision in the assessment procedure and have severely limited the effectiveness of the civil and criminal penalties. Although the Supreme Court finally upheld the assessment procedures in the civil action, substantial damage had been done to the effectiveness of the civil penalty.

Besides invalidating two specific federal regulations and casting doubt on all "improved" health and safety standards, the *Finley* case has resulted in a scandal casting doubt on the Government's ability to prosecute criminal charges for health and safety violations in coal mines. The scandal arose when the Government's prosecutor in the *Finley* case resigned from the United States Attorney's Office and joined the law firm that had represented Finley Coal Company during the criminal action. The prosecutor changed jobs after arguing for dismissal of twenty-four counts of the indictment in return for a *nolo contendere* plea on four counts. This change in jobs gained wide publicity in Kentucky.

In an apparent attempt to justify his actions, the former prosecutor told the influential Mountain Eagle newspaper that if he had been in charge of the Government's case from the beginning, there

[191] *Id.* at 290-91.

probably would never have been indictments filed against the company at all, and that the charges against Finley Coal Company were "miniscule misdemeanor charges."[192]

In assessing each of the approximately 100,000 yearly violations of the Coal Mine Act, the Government must apply not only the six criteria discussed earlier but also must provide uniformity in its treatment of each mine. This process has caused the assessment bureaucracy to become bogged down with paper work.

Four problem areas have been identified by internal auditors and the General Accounting Office (GAO).[193] These four areas have continually hampered efficient enforcement of the Act. First, the penalty assessments, settlements, and collections are exceedingly slow. Delays have been as long as five years. Second, the penalties paid are significantly lower than the amounts originally assessed. This lowering of penalty amounts obviously detracts from the value of the penalty as a deterrent. Third, the factors used in determining the amount of penalty initially assessed and collected are inconsistently applied. The amounts assessed for the same violation at the same mine vary, depending upon the assessment officer assigned to the case. Finally, controls are not adequate to insure that all violations are assessed, or that those which are assessed are actually settled or collected. Some controls are so lax that many files "slipped through the cracks."

To improve the assessment, settlement, and collection procedures, MESA has revised its procedures five times with a sixth revision in the works. These revisions have been comprehensive and have resulted in the complete elimination of any of the four problem areas. These four areas interact, and along with the legal challenges, have resulted in low penalties. It is important to analyze each of the four areas in detail to show how the interrelationship among them lessens the deterrent effect of the civil penalty.

There is no dispute that penalty assessments and collections have been extremely slow. On average, before 1975, it took MESA 149 days to assess 327 violations with an additional 117 days for MESA to collect fines for 74 of the violations. The other 153 viola-

[192] UNITED MINE WORKERS JOURNAL, 87th Year, No. 4., (1976) at 5.

[193] GAO, Report to the Congress, *Improvements Still Needed in Coal Mine Dust-Sampling Program and Penalty Assessments and Collections* (December 31, 1975) at 40-46 [hereinafter referred to as "*GAO Report*"].

tions were uncollected at the time of the conclusion of the study. Depending on whether the operator chose to pay or not, many of these violations are still subject to litigation. Since there is no additional penalty assessed against the operator if the case must be referred to the Department of Justice for collection, the mine operator may simply wait. Some have been waiting for as long as five years. MESA officials stated to the GAO that the fines were not promptly collected because the penalty amounts were higher than the operators were willing to pay, the penalties were contested in courts, and that MESA did not have sufficient personnel to handle the work load.

The GAO analyzed eighty-three cases settled by the Solictor's Office of the Department of the Interior and found that the average assessed penalty of $200 was reduced to $70 for settlement. This is a reduction of 65 percent. The GAO further found that in the cases in which an administrative hearing was requested before the Office of Hearings and Appeals (OHA), the administrative law judges further reduced the penalty assessments. Even after the administrative hearing, the mine operator is entitled to *de novo* review in federal district court and an opportunity to settle with the United States Attorney's Office.

In revising the assessment procedures, MESA has reduced the amount of the penalty assessed in order to conform to the amounts usually assessed by the administrative law judge. Basically, MESA has attempted to establish the penalties at a level which will encourage mine operators to comply with the Act rather than violate the standards. The new procedures have resulted in lower fines and increased settlements. Recalcitrant operators are enjoying long delays, however, along with the reduced penalties. The GAO agreed that MESA's revised assessment and collection procedures will aid in obtaining timely collections, but questioned the effectiveness of a reduced penalty as a deterrent to compliance with the health and safety standards.

The second problem hampering enforcement is the inconsistent application of the six criteria for assessing penalties. Each violation must be assessed in accordance with the six criteria which are: (1) history of previous violations, (2) appropriateness of the penalty to the size of the business, (3) negligence, (4) effect on the operator's ability to stay in business, (5) gravity of the violation, and (6) good faith in compliance. The GAO found in its sample of fifty-five mines that MESA inconsistently applied the factors. Often similar violations were assessed differing amounts.

The inconsistencies were greatest in determining gravity and negligence. MESA assessors in determining gravity categorized a violation as nonserious or serious in accordance with the extent of injury.

Negligence is broken down into three categories: (1) not negligent, where the operator could not reasonably know of the violation; (2) ordinary negligence, where the operator failed to exercise reasonable care to prevent or correct a violation; and (3) gross negligence, where an operator caused the condition by exercising reckless disregard of the mandatory health or safety standards or by deliberately and wantonly failing to correct an unsafe condition. These standards are unclear and assessment officers cannot consistently interpret the nature of similar violations. The problem lies in the gap between the inspector citing the violation and the assessment officer's calculation of the penalty. The assessment officer's judgment as to each of the criteria is based on personal experience and the short handwritten information provided by the inspector for the assessment officer. The GAO recommended more detailed standards in order to insure consistency in the assessments. While consistency is necessary to insure fairness in the assessment process, the approach of the GAO is too rigid and complicated because the Coal Mine Act does not demand absolute consistency in amounts assessed. After all, each violation is subject to *de novo* review in district court. This means that regardless of the manner in which the penalty is determined, an operator may fully litigate the issue before a jury. Absent court rulings, there is no need to achieve mathematical certainty in the amounts assessed.

A more compelling defect in the assessment process is the adequacy of management control over violations. The problem has been that MESA has no information system to assure that violations once assessed are collected. Violations have been assessed twice, some not assessed at all, and invalid violations have been assessed.

In order to remedy this condition, the Assessment Office developed a computerized system to track each violation through the assessment, settlement, hearing and collection procedure. This system has been successful in keeping track of the violations and should insure that penalties are assessed and collected for all violations.

The GAO, in concluding its report, recommended that the

Secretary of the Interior instruct MESA to more clearly define the assessment factors in order to insure that uniform assessments and timely collections will result. Moreover, the report recommended that the Secretary instruct MESA to evaluate the penalty assessment program to ascertain whether the penalty amounts assessed are high enough to deter further mine violations.[194]

The GAO report is harsh in its evaluation of the civil penalty assessment process. The report does not, however, advocate the abolition of mandatory civil penalties, but instead urges efficient enforcement. The GAO report does not attempt to calculate what a deterrent penalty would be. Theoretically, a deterrent penalty must be higher than the "savings" a mine operator incurs in violating the health and safety standards.

Unfortunately, it is impossible to calculate the cost of safety for every possible violation. Costs vary from mine to mine and from day to day. The GAO assumes *sub silentio* that higher penalties are needed because the penalties currently assessed are less than the cost of safety. No proof exists for this assumption. Higher penalties will result in more deterrence, but only if the penalty is collectible. The trade-off is between low collectible penalties versus high uncollectible penalties.

Ignored too in the GAO report are other factors strengthening the deterrent effect of monetary penalties. Penalties assessed against mine operators have a nuisance value. Mine operators must incur substantial legal fees to defend civil penalty suits. These suits engender adverse publicity which mine operators seek to avoid. Some operators are stigmatized as being repeat violators. Industry pressure is brought against the repeat offenders out of fear of stronger congressional action. The coal industry does not want additional federal regulation. Increased accidents and fatalities coupled with concerted efforts to stymie civil penalties would inevitably lead to stronger congressional action. Large coal companies clearly attempt to reduce the number of health and safety violations in order to improve their "record". Fear of stronger regulation is a potent incentive.

[194] *Id.* at 46.

V. Penalties Collected Under The Federal Coal Mine Health And Safety Act Of 1969

A. Effectiveness of Mandatory Civil Penalties as a Deterrent

Acknowledging the negative effect of the legal challenges upon the effectiveness of the civil penalty provisions and the administrative problems incurred in the assessment procedure, have the civil penalty provisions resulted in deterrence of health and safety violations? The intent of Congress in requiring that each violation of the Coal Mine Act be assessed a civil penalty was clearly an effort to deter future violations by making present violations costly. In order to achieve this goal of deterrence, MESA has established three criteria: the civil penalties assessed must be (1) timely, (2) realistic, and (3) consistent.[195]

First, if the assessment of the violation is not timely, the mine operator will not be able to relate the penalty to the specific violation of the Act, and therefore, the effect of the penalty is nullified. To be effective, the mine operator must be aware of both the violation of the Act and the penalty assessed. Second, the penalty must be reasonable or the mine operator will appeal through the administrative law forum, thus putting off payment for a long period of time and again losing sight of the violation-penalty relationship. Finally, to insure deterrence, a consistent method of determining the amount of the penalty must be utilized. If the penalties are not consistently determined, the mining industry will lose confidence in the assessment program and thereby cause more litigation with inevitable delay.[196]

To fulfill these three basic aims of the assessment program, new regulations for the assessment of civil penalties were put into effect on August 1, 1974.[197] These regulations have had the net effect of reducing the amount assessed for each violation. A system has been established whereby each of the six criteria is assigned "points". The points are then added up and the amount of the penalty is determined by reference to a table. This system has the net effect of reducing penalties because the points are added,

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[195] United States Department of the Interior, *Annual Report of the Secretary of the Interior Under the Federal Coal Mine Health and Safety Act* (1974) at 15. This is the latest available report and was made available to the public in January 1976 [hereinafter referred to as *1974 Annual Report*].

[196] *Id.*

[197] 30 C.F.R. § 100.6 (1975).

whereas under the old system the points were multiplied.

Toward the end of 1973, the Secretary of the Interior directed that the large backlog of unassessed violations held in the Office of Assessments be eliminated. As of January 1, 1974, there were approximately 62,436 unassessed violations. The goal was to reduce the inventory to 3,500 violations by July 1, 1974. To further aggravate the problem, approximately 43,941 new violations were expected by the Assessment Office during this period. The Assessment Office met this goal and brought its inventory up to date. During the January 1 to December 31, 1974 period, 135,483 violations were assessed.

In late 1974, a settlement conference procedure was created[198] requiring the Office of Assessments to hold conferences with the mine operators to discuss the penalties and review new material provided by the mine operator. This material is intended to assist the conference office in reaching a settlement amount agreeable to all parties. Mine operators also were allowed to recall cases to the Office of Assessments for conference.[199] This resulted in the recall of 4,320 cases to the Office of Assessments for conference. In addition, 5,465 new cases were referred to a conference. In 1974, settlement conferences were held in 4,501 cases. This left an inventory of 5,292 cases which were eliminated by late 1976.

These improvements were instituted by the Assessment Office in an effort to improve the deterrent value of the civil penalties. The Interior Department recognized that the collection of fines was a problem and noted with approval that the amount collected increased dramatically when the procedures discussed above were instituted. As of January 1976, the total collected under the new procedures exceeded twenty million dollars.[200] Efforts are being made to refine the assessment procedures and to increase the penalties to amounts equal to or greater than the "savings" to the mine operator in violating the health and safety standards.

B. Recent Supreme Court Decisions on the Assessment Process

The two recent Supreme Court decisions, *National Indepen-*

[198] *Id.*
[199] 30 C.F.R. § 100.8 (1975).
[200] 1974 Annual Report at 17.

dent Coal Operators Association v. Kleppe[201] and *Kleppe v. Delta Mining, Inc.*,[202] which have been discussed earlier, have removed the major roadblock to collection of the approximately 2,500 cases which had been referred to various United States Attorney's Offices for collection. Although the decisions are too recent for their full impact to be felt, efforts are being made to expedite the collection of penalties in many old cases now languishing before district courts. These collection cases involve the most recalcitrant mine operators in all the various mining regions. Many of these operators felt that the law would disappear and that the government was not serious in its desire to collect mandatory civil penalties. Many of the coal operators who paid their civil penalties felt that it was unfair that some mine operators could go years without paying anything. Among the fraternity of coal operators the message now is clearly that the Act is here to stay. It is certain that the collection of these cases although expedited, will be met with resistance. Jury trials and future legal challenges will result. Importantly though, mandatory civil monetary penalties have cleared their first major hurdle.

VI. Conclusion

In enacting the Federal Coal Mine Health and Safety Act of 1969[203] Congress has resurrected and given new life to the traditional civil monetary penalty sanction. In refining this sanction, Congress has created the mandatory civil penalty. It is mandatory because for each violation of the Act cited, a fine *must* be assessed. This sanction was utilized because it is flexible and is easily tailored to fit the particular infraction of the standards involved. It has the advantage of avoiding the all or nothing approach of permit revocation and is an excellent tonic for *malum prohibitum* acts. The most important advantage of the mandatory civil penalty is that it is not a criminal sanction. Since it is not criminal in nature, the enforcement proceedings can, for the most part, be carried out by the agency itself, thereby saving the courts and the Department of Justice for more pressing matters. This administrative advantage is not achieved without costs, however. The defendant in a civil penalty proceeding is not entitled to the same rights as a defendant in a criminal action. This has resulted in much opposi-

[201] 423 U.S. 388 (1976).
[202] 423 U.S. 403 (1976).
[203] 30 U.S.C. §§ 801 *et seq.* (1970).

tion to these penalties, since a person subject to civil monetary penalties often feels entitled to the rights of a criminal defendant.

Case law traditionally has treated the government as civil plaintiff as it has any other civil plaintiff. Early cases, as discussed, were unequivocal. Later cases begin to move from this position, and courts are beginning to look behind the congressional label of "civil". With the increasing trend of governmental regulation, courts will certainly examine closely their traditional positions. A monetary fine has the same impact on the defendant whether it is denominated civil or criminal. This, of course, is the crux of the debate. Defendants are fined under the civil monetary system without being given full rights accorded to criminal defendants. Local mine operators, many of whom are prominent businessmen, are being assessed monetary penalties for acts which at best are *malum prohibitum*, without being accorded the rights given to a common criminal.

Trial courts faced with this situation will entertain the idea of granting these defendants rights not normally given in a civil proceeding. What may be created is a quasi-criminal action. This action would require that selective rights be given a defendant because the federal government is the plaintiff. How many additional rights would be conferred is unknown. Courts might, however, use this quasi-criminal action as a method to control government regulation and to force the central bureaucracy to become more aware of local problems.

Criminal monetary penalties, individual civil penalties, corporate penalties, and other specialized monetary penalties are clearly being relegated to the role of backup penalty provisions reserved for special violators of congressionally mandated standards. These penalties give added sanctions to the administrator to punish serious violators. The courts will clearly treat these types of violations as more serious, and a defendant will be accorded full rights in the criminal penalty actions and perhaps in the other specialized actions as well.

Given this legal context involving increasing challenges to the concept of imposing civil monetary penalties, how effective are these penalties as a deterrent in enforcing compliance with a comprehensive health and safety program? A comparison of two strikingly similar statutes, the Federal Metal and Nonmetallic Mine

Safety Act[204] and the Federal Coal Mine Health and Safety Act of 1969,[205] one lacking a comprehensive monetary penalty system and the other containing far-reaching and innovative monetary penalties, reveals that the Metal Mine Act provisions are not being as vigorously enforced as those of the Coal Mine Act. The Metal Mine Act is generally considered a weak statute. The Coal Mine Act, with mandatory civil penalties, individual civil penalties, corporate civil penalties and criminal penalties, is vigorously enforced and is widely felt to be the more effective of the two statutes. This effectiveness is due, in large part, to the congressional demand that each and every violation of the law be assessed a civil penalty.

These mandatory civil penalties have been controversial. The entire assessment procedure has been under serious challenge. The challenge of the *National Independent Coal Operators Association v. Kleppe*,[206] had cast doubt on the entire assessment process. This challenge has been firmly rebuffed by the Supreme Court and the effects of that decision are yet to be felt.

The mandatory civil penalty provisions have resulted in approximately 100,000 violations a year being referred to the Office of Assessments. This tremendous flow of violations has resulted in untimely and inconsistent assessments. To further exacerbate the problems surrounding civil penalties, settlements have been reached which were significantly lower than the amounts originally assessed. There were, moreover, inadequate controls to assure that violations assessed were collected or settled. These legal and administrative problems have limited the deterrent value of the notice of violation. The nexus between the notice of violation and the assessed penalty was not clearly established to the mine operator.

To increase the effectiveness of the civil penalty, the Secretary of the Interior in 1974, ordered that the backlog of unassessed notices of violation be reduced, that the assessment procedure be revised, and that all parties involved in enforcement coordinate their efforts. The three goals of timeliness, consistency, and relevancy were established. Because of these strong efforts, the goals are being reached and the deterrent effect of the mandatory civil penalty has been enhanced.

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[204] 30 U.S.C. §§ 721 *et seq.* (1966).
[205] 30 U.S.C. §§ 801 *et seq.* (1970).
[206] 423 U.S. 388 (1976).

Even with the optimistic legal and factual assessments discussed above, the future of the mandatory civil penalty is uncertain. Opposition to civil monetary penalties is likely to increase as more enforcement actions are brought in the federal courts. Challenges to these civil penalties will affect enforcement, and district courts will be forced to struggle with the difficult constitutional issues surrounding civil penalties.

Challenges to the enforcement provisions of the congressional programs in matters of health, safety or the environment will open up a new battleground. The mandatory civil penalty provisions of the Coal Mine Act are moving into a new successful stage of achieving deterrence. The only obstacle now will be the role of the district courts in the *de novo* review proceedings under the Coal Mine Act. At issue will be whether civil penalty collection cases can be speedily processed or are destined to be tied up in protracted litigation. This litigation would challenge the very nature of the civil monetary penalty and might result in the creation of a quasi-criminal action, but would also result in additional delay. This delay will burden court dockets with thousands of civil penalty cases. Deterrence will be weakened, and congressional policy defeated.

This is the uncertain future which awaits the mandatory civil penalty provisions of the Coal Mine Act. The first jury trial has yet to be held. The legal challenges are just beginning. Without strong leadership from the courts, this flexible and efficient sanction will be bogged down in more delay, and enforcement of congressional policies in the areas of health, safety and the environment will be thwarted.